SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 343.

BEHN, MEYER & COMPANY, LIMITED, APPELLANT,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES, APPELLEES.

BRIEF ON BEHALF OF LAZARUS G. JOSEPH, RECEIVER OF BEHN, MEYER & CO., LIMITED, AND PETITIONER, FOR LEAVE TO INTERVENE.

MARION BUTLER,
JOHN W. CLIFTON,
HENRY D. GREEN,
Counsel for Lazarus G. Joseph, Receiver, etc.

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I.

Statement of the Case.

Behn, Meyer & Company, Ltd., was organized and incorporated at Singapore, in the Straits Settlements, in the year 1905. It was a British Corporation and, therefore, a British citizen. In 1907 the Corporation of Behn, Meyer & Company, Ltd., desiring to do business in the Philippine Islands, made application for a license to be issued to them for that

purpose. On February 5, 1907, the license was issued by the Division of Archives, Government of the Philippine Islands, which permitted the Corporation of Behn, Meyer & Company of Singapore to engage in business in the Philippine Islands. Under this license, Behn, Meyer & Company traded in the Philippine Islands and built up a distinct business therein. They maintained their office, warehouse, etc., in Manila and at other points in the Philippine Islands, and there thus was created a distinct business entity, the business of Behn, Meyer & Company, in the Philippine Islands, which was an asset of Behn, Meyer & Company, Ltd., or, expressed differently, was a part of the general business activities of the Corporation of Behn, Meyer & Company, Ltd., which had its domicile at Singapore. (See page 112.)

Upon the outbreak of the war between England and Germany in 1914, the British Public Trustee seized the Corporation of Behn, Meyer & Company, Ltd. The British Public Trustee, however, did not come into the Philippine Islands and take possession of the assets of the Corporation which existed there, that is to say, the business of Behn, Meyer & Company, Ltd., in the Philippine Islands. The Philippine Islands Office, under the charge of J. M. Menzi, its manager, continued to do business. It was already in possession of and it continued to acquire property and assets and also to assume debts and other liabilities to creditors. These creditors were basicly creditors of Behn, Meyer & Company, Ltd., of Singapore, but primarily they were the creditors of the business of Behn, Meyer & Company in the Philippine Islands.

After the declaration of war between the United States and Germany and the passage of the Trading With the Enemy

Act, Francis Burton Harrison was appointed managing director for the Philippine Islands of the Alien Property Custodian, A. Mitchell Palmer. By letter dated *February 16, 1918,* Mr. Harrison informed Behn, Meyer & Company, Ltd., Manila, that Mr. W. D. Pemberton had been appointed receiver of "Behn, Meyer & Company, Ltd.," to assume charge of the business and assets of the said firm as a going concern and to submit weekly reports to the said Mr. Harrison. (See page 43.) Harrison also seized physical possession of the plant and effects of Behn, Meyer by the armed force of his constabulary. (See page 113.)

This action of Mr. Harrison was repudiated by the Alien Property Custodian as it was an entirely illegal action. Mr. Harrison thereafter applied to the War Trade Board for a license under the Trading With the Enemy Act for Behn, Meyer & Company, Ltd., which license permitted Behn, Meyer & Company to continue its business or in the alternate to liquidate its business according as the Alien Property Custodian might deem advisable. (See pages 88-89-113.) This license was illegally forced on Behn, Meyer & Company, as will hereafter be shown, but under Pemberton's supervision it continued its business until February, 1919. Sometime during the year 1918 Menzi formulated his plan to steal the assets of Behn, Meyer & Company, Ltd., which consisted of going through the forms of selling the properties, real and personal, of the Corporation to one John Bordman, official receiver of certain enemy concerns under the Alien Property Custodian in the Philippine Islands, for a price far below their value, using the funds of Behn, Meyer & Company, Ltd., then on deposit in the Bank of the Philippine Islands for this nefarious transaction, and then to cover

the fraud by reporting to the Alien Property Custodian the money purporting to represent the purchase price. (See pages 86-101 and 113-114.)

The plan thus devised was put into action as follows:

On *January 2, 1919,* Douglas M. Moffat, managing director for the Alien Property Custodian in the Philippine Islands, wrote to Behn, Meyer & Company stating that it was the desire of his office that liquidation under the War Trade Board license be completed without further delay and if not completed the license would be revoked and the property sold at public auction. (See page 43.) On January 9, 1919, John Bordman resigned his official position as receiver under the Alien Property Custodian by letter, now on file in the Custodian's office in Washington. *On the 23d day of January, 1919,* Menzi executed on behalf of Behn, Meyer & Company a bill of sale to John Bordman whereby he sold him the entire stock of merchandise, all the furniture and fittings, a parcel of land, trade-marks, and leasehold interest in cable codes, cuts, electrical plates, and customers' lists, etc., belonging to Behn, Meyer & Company in the Philippine Islands. The consideration for this sale was 600,000 ₱. The sale was approved by Douglas M. Moffat. (See pages 45-47.)

On the same day, *January 23, 1919,* the said Douglas M. Moffat, acting in his official capacity, again wrote to J. M. Menzi, manager of Behn, Meyer & Company, stating that it was the desire of his office that the accounts receivable by Behn, Meyer & Company in the Philippine Islands should be sold under the license granted by the War Trade Board. This letter states that the such sale may be made with their approval to one John Bordman "who was the purchaser of the

assets of the business at public sale thereof held by you." (See page 44.)

On the following day, *January 24, 1919,* Menzi, acting for Behn, Meyer & Company, executed a bill of sale of accounts receivable by Behn, Meyer & Company, Ltd., of the Philippine Islands. Consideration was 60,000 ₱. The sale was approved by Douglas M. Moffat.

Thus far Menzi's plan had worked smoothly. He had sold, when under the War Trade License, he had been required to sell by the Directing Manager of the Alien Property Custodian for the Philippine Islands, and the sales had been approved by this official. Menzi now had in his possession 660,000 ₱ of Behn, Meyer & Company's money, advanced by the Bank of the Philippine Islands to John Bordman as the purchase money for such sales. It, therefore, became necessary to dispose of this money in order to maintain the seeming regularity of the proceeding. This might have been, and in fact should have been done under the authority contained in the license itself. For some reason, however, it was decided by Menzi and his confederates to do it under the Trading With the Enemy Act, and Section 2 (*c*) of the Executive Order of February 26, 1918.

On February 21, 1921, an alleged demand for enemy money was made upon Pemberton as receiver of Behn, Meyer. (See pages 67-70.) This demand declared that Behn, Meyer had been determined to be an "enemy," recited that Pemberton on February 19, 1919, had reported money of Behn, Meyer as held by him, and required him to pay such to the Alien Property Custodian. This demand was remarkable in that although the blank, on which it was made, contained a space for the insertion of the name of the authorized depos-

itary to whom such money should be paid, yet no name of any dipostary was filled in, and in that it was not signed by any official, not even by Moffat, but simply initialed "P. B. P.," which are the initials of P. B. Pope, a clerk in Moffat's office.

On *February 28, 1919,* the same P. B. Pope signed a letter on behalf of Douglas M. Moffat, addresed to "W. D. Pemberton, receiver of Behn, Meyer & Company, Ltd.," in which aknowledgment was made of the receipt of 392,674.96 ₱ "paid in answer to our demand, dated February 21, 1918." The letter further stated that "formal acquittance will be mailed you direct from our Washington office." (See page 55.)

The illegality of this demand and receipt and the obvious inconsistency of using them upon a company which rightfully or wrongfully was operating under a War Trade license, are matters which will be dealt with at length hereafter. At this point suffice it to call the attention of the court to the fact that Pemberton paid over only 392,674.96 ₱ out of the 660,000 ₱ which must have been in his hands if the sales of January had been *bona fide,* and that no formal acquittance was ever mailed to him from Washington.

Matters remained in this condition until February, 1922, when an event happened which changed the entire situation and lead ultimately to this petition of intervention. On *February 24, 1922,* A. N. Juredini & Brothers, intervener in an action of replevin brought by Behn, Meyer & Company in 1917 against Stanley *et al.,* Insular Collector of Customs, recovered a judgment against Behn, Meyer & Company. (See pages 24-32.) On *April 6, 1922,* execution was issued upon the judgment and was returned un-

satisfied on *April 8.* (See page 34.) The return showed that Menzi now disclaimed any responsibility for Behn, Meyer & Company, and stated that all the properties had been taken over by the Alien Property Custodian, sold, and the proceeds transferred to Washington. On August 8, Jureidini applied for the appointment of a receiver, calling attention of the court to the return of the sheriff, and alleging that there were interests and choses in action, which the receiver could collect. On *August 10, 1922,* Lazarus G. Joseph, was appointed receiver by George R. Harvey, Judge of the Court of First Instance of Manila, the order of the court showing it was fully advised as to the state of affairs obtaining in regard to Behn, Meyer. Lazarus G. Joseph posted bond and took oath of office *August 10.* (See pages 33-37.)

In the meantime, an attempt was made to continue the process of spoiling this company, and depriving its creditors in the Philippine Islands of the assets to which they were entitled. Three of the original incorporators of Behn, Meyer & Company, E. L. Lorenz-Meyer, A. D. Laspe and F. H. Witthoefft, who were German subjects, and enemies under the British and American Trading with the Enemy Act, and who represented themselves to be the sole surviving stockholders of Behn, Meyer & Company, Ltd., of Singapore, held an alleged extraordinary stockholders' meeting at Hamburg, Germany, at which they elected directors, constituted themselves the consulting committee of the Company with plenary powers, and as stockholders voted to bring this suit. There in exercise of their self-conferred authority, they as consulting committee, executed a power of attorney to one Emil W. Martens, and this Martens proceeded to bring suit

against the Alien Property Custodian in the name of Behn, Meyer & Company, Ltd., for the return of the moneys paid to the Alien Property Custodian, as the proceeds of the sale of the assets of Behn, Meyer & Company, as above described. (See page 113, and original Bill of Complaint in Supreme Court of District of Columbia.) On *July 28, 1922,* the case of Behn, Meyer & Company, Ltd., vs. Miller et al., was commenced in the Supreme Court of the District of Columbia. A motion to dismiss was filed *September 15, 1922.* On *March 2, 1923,* the court sustained the motion, and on *March 22,* entered a final decree dismissing the bill. On *April 11, 1923,* the case was appealed to the Court of Appeals of the District of Columbia.

Returning to events in the Philippine Islands, it appears that in May, 1923, Joseph as receiver brought suit in the Court of First Instance, Manila, to revive a judgment recovered by Behn, Meyer in 1917 against the Hamburg-Amerika Line. The suit was demurred to on the ground, among others, that the Court had no jurisdiction. The demurrer was overruled by Judge S. del Rosario. Continuing his efforts to collect the assets of Behn, Meyer on *August 1, 1923,* Joseph as receiver for Behn, Meyer & Company wrote to Menzi, former manager of Behn, Meyer & Company, requesting that the books of Behn, Meyer be turned over to him. On *August 3, 1923,* Menzi replied declining to turn over the books. (See page 56.)

On *August 31,* Joseph as receiver for Behn, Meyer & Company sued Menzi, Bordman and The Bank of the Philippine Islands in the Court of First Instance, Manila, alleging as follows:

(1) That the War Trade license was issued in March, 1918.

(2) That Bordman was an employee of the Alien Property Custodian in 1919 and by law could not deal with any property subject to the supervision of the Alien Property Custodian for his own benefit.

(3) That Menzi was a Swiss citizen and by law prevented from dealing for his own benefit with Behn, Meyer & Company.

(4) That notwithstanding the law Menzi and Bordman agreed that Menzi purported to act under the terms of the aforementioned license should sell to Bordman the assets of the firm of Behn, Meyer & Company and that the Bank of the Philippine Islands agreed to furnish the money to purchase the assets.

(5) That Menzi did execute bills of sale in favor of Bordman and the Bank advanced the cash for the sale.

(6) That for the reasons above set forth the sale was void and illegal and was not approved by the Alien Property Custodian or the War Trade Board.

(7) That the real and personal property owned by Behn, Meyer & Company in March, 1918, was worth 3,000,000 ₱.

(8) That Menzie is now in possession of part of the above mentioned assets; that Menzi further purported to sell to Bordman under the said War Trade license bills receivable by Behn, Meyer & Company.

(9) That the accounts set forth in the said bill of sale of bills receivable were false and fraudulent.

(10) That one item in said bill of sale, namely, 178,695.82 ₱ owed by Emil Lutz, Zurich, to Behn, Meyer & Company was attempted to be bought by Bordman for the sum of 26,804.37 ₱; that there never was such an act in existence, but that prior to the attempted sale Menzi used the funds of Behn, Meyer & Company to purchase from the Bank of the Philippine Islands a bill of exchange in favor of Emil Lutz in the sum of 178,695.82 ₱, which bill of exchange he did not transmit to Emil Lutz but retained until after the execution of the bill of sale.

And the receiver prays that Menzi, Bordman and the Bank of the Philippine Islands be required to account for the funds of Behn, Meyer & Company received by them and to deliver to the receiver all of the property of Behn, Meyer & Company taken by the defendants. (See pages 86-101.)

Having filed his bill the receiver continued his efforts to obtain the books of the Company. On *September 5, 1923,* Joseph, as Receiver, petitioned the Court of First Instance of Manila for a rule to show cause why the said Menzi should not deliver the books of Behn, Meyer & Company to him, which rule issued the same day over the signature of Diaz, judge, requiring Menzi to answer within seven days. On *September 13,* Menzi filed an answer to the rule in which he stated that on the 16th day of February, 1918, all the business and assets of Behn, Meyer were taken over by the Alien Property Custodian; that all the assets were sold under the supervision of the Alien Property Custodian to John M. Bordman; that the books of account had been delivered to the said Bordman, and that the said Joseph was not the legal receiver of Behn, Meyer & Company.

This activity of the receiver in bringing suit and vigorously pushing his demand for the books was viewed with alarm by Menzi and his confederates. Also it was not the sort of activity likely to be favorably regarded by those bringing suit in Washington for the return of the 600,000 ₱ by the Alien Property Custodian as above described. Therefore an attempt was made to put a stop to it, by eliminating the receivership.

On *September 14, 1923,* Bordman, Menzi and the Bank of the Philippine Islands moved to intervene in the receivership proceedings for the purpose of making a motion to vacate the order of August 10 whereby Joseph had been appointed receiver of Behn, Meyer & Company, and, when leave to intervene had been granted, they filed their said motion. (See pages 57-70.) On *September 17, 1923,* an opposition to said motion was filed on behalf of said Joseph. (See pages 71-74.) On *September 26, 1923,* Diaz, substitute judge of the Court of First Instance, disregarded the finding of fact made by Judge Harvey in appointing the receiver and the decision of Judge del Rosario in sustaining the appointment, regular, judges of the Court of First Instance and removed the receiver on the palpably untenable ground that the court presided over by Judge Harvey had not been informed of the sale by Menzi of the properties of Behn, Meyer. (See pages 75-79.)

On *October 1, 1923, Jureidini & Joseph* moved for a reconsideration, which was denied under date of *December 3, 1923,* by the said Diaz. (See pages 80-82.)

The receiver, however, refused to accept the decision of the Court of First Instance, or to give up his efforts to collect the assets of the corporation from those who had in

effect stolen them. By the laws of the Philippine Islands, an appeal would act as a supersedeas and keep the receivership alive, therefore, under date of *December 12, 1923, Joseph & Jureidini* filed exceptions to the said order of Diaz denying their motion for reconsideration and gave notice of their intention to perfect a bill of exceptions. On *May 14, 1924*, the bill of exceptions was tendered. On *May 19* it was certified by Judge Harvey, Regular Judge of the Court of First Instance. On the *28th day of May* it was certified by the Clerk of the Supreme Court and by him filed in the Supreme Court of the Philippine Islands. (See pages 82-85.)

In the meantime on *February 11, 1924*, the Court of Appeals D. C. had dismissed the appeals in Behn, Meyer & Company vs. Miller et al. On March 8, 1924, an appeal to the Supreme Court of the United States was allowed. Joseph, therefore, proceeded promptly to prepare the necessary certified copies of papers deemed necessary to support this intervention, upon the arrival of which in Washington this intervention was prepared and filed.

In the meantime we are infomed that the Supreme Court of the Philippine Islands has decided the case of Behn, Meyer *vs.* Hamburg-Amerika Line in favor of the appellants, a decision which will be dealt with in due course.

II.

Argument in Support of the Motion to Intervene.

(*a*) Lazarus G. Joseph is Receiver of Behn, Meyer & Company in the Philippine Islands.

The basic reasons for asking leave to intervene in this case are set out in the motion and petition of your inter-

venor, the receiver, with exhibits and amended petition in this cause attached already filed in this court.

The attorneys for the plaintiff in this suit in their answer to the said petition to intervene have attacked at great length the appointment of Lazarus G. Joseph as receiver; have set up the fact that he was removed from his receivership; have argued that he never was properly receiver and finally, have attacked his right to intervene even granting that he was properly appointed and is now receiver.

Answering such contention we submit:

(1) *Lazarus G. Joseph Was Properly Appointed Receiver.*

In support of this contention it must first be pointed out that the record in this case itself discloses the entire regularity and propriety of his appointment by Judge Harvey in the Court of First Instance, Manila.

In January, 1917, Menzi, manager of Behn, Meyer in the Philippines, filed suit on behalf of Behn, Meyer against Stanley, Collector of Customs, and by submitting the case to the court submitted to the jurisdiction of the court at that time. This suit was an action of replevin in which Behn, Meyer replevied seven cases of cotton goods from the collector. A. N. Jureidini & Bros. intervened, claiming the goods belonged to them. On February 28, 1918, the Court rendered a decision favorable to Behn, Meyer, and A. N. Jureidini & Bros., appealed from that decision to the Supreme Court. The Supreme Court on the 1st day of October, 1919, reversed the decision of the Court of First Instance of Manila, and remanded the cause to the Court of First Instance for a new trial. Again Menzi on behalf of Behn, Meyer came into the Court of First Instance in January, 1922, and still alleging under oath the facts set

up in the first complaint regarding jurisdiction submitted the same to the Court of First Instance for decision on the merits of the case. The Court of First Instance of the City of Manila, by Judge Geo. R. Harvey, rendered a decision on February 24, 1922, in favor of the appellant A. N. Jureidini & Bros., and against the plaintiff, Behn, Meyer & Company, Ltd.

Thereupon a writ of execution was issued against the property of the judgment debtor, Behn, Meyer & Company, Ltd., on or about April 6, 1922, and was returned unsatisfied, the return showing that J. M. Menzi for the first time during the whole period of six years disclaimed interest in or responsibility for the firm of Behn, Meyer & Company, Ltd., and stated that the properties had been taken over by the Alien Property Custodian and the goods sold and the funds removed from out of the jurisdiction to Washington, D. C. The record shows that on June 8, 1922, an *alias* execution was issued upon the same judgment, but was returned unsatisfied on June 14, 1922.

That on August 8, 1922, the judgment creditor applied to Judge Harvey, the same judge who had decided the case in February, 1922, for the appointment of a receiver for the property, assets, and estate of Behn, Meyer & Company, Ltd. The application alleges:

> "That your petitioner is informed and believes and so states the fact to be that the plaintiff above named, the judgment debtor herein, has subsequent to the initiation of the above action, but prior to the rendition of the final judgment herein, ceased to actively conduct its business with the Philippine Islands and has forfeited its corporate right to do so and is insolvent, but has within the Philippine Islands and

within the jurisdiction of this court sufficient assets, consisting of various divers interests in properties and choses in action, to satisfy the judgment herein, but that the same cannot be secured to be applied upon the judgment herein without the appointment of a receiver to collect and preserve said assets."

Judge Harvey, of the Court of First Instance of Manila, under date of August 10, 1922, placed the property, assets, and estate of the plaintiff, Behn, Meyer & Company, Ltd., under a receivership and appointed the present Lazarus G. Joseph the receiver, stating in his order:

"It appearing to the court therefrom that executions have been issued upon said judgment, both against the plaintiff named and against its bondsmen, and that returns thereon have been made by the sheriff of Manila showing that no property of said plaintiff or its bondsmen can be found within the jurisdiction of this court to satisfy said judgment herein and that said plaintiff had ceased actively to conduct its said business within the Philippine Islands and had forfeited its corporate right to do so and is insolvent, and that execution cannot be made against its bondsmen for the reason that they and each of them have been deported from the Philippine Islands and no property of said bondsmen can be found within the Philippine Islands upon which to levy execution; and it further appearing that said plaintiff may have assets which might be applied upon said judgment herein if the same be located and brought within the jurisdiction of the court, and in order to protect the judgment creditor herein it is necessary that a receiver be appointed to collect and preserve the assets and estate of said plaintiff, and being fully advised in the premises;"

It remains to point out that the receiver thus appointed was a statutory receiver, such as is provided for by the Philippine Code, as follows:

> "Receiver of a Corporation.—When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights, the Court of First Instance of the province where the corporation has its principal place of business may, on complaint of a creditor of the corporation, or a stockholder or member thereof, appoint a receiver to take charge of its estate and effects, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the money and other properties that shall remain over among the stockholders or members."

Under this statute the court has a right on any one of the three grounds named to appoint a receiver. The Court of First Instance found as a fact that the statutory ground of insolvency existed; and, besides that, there might be assets found and recovered by a receiver. Therefore it is submitted that without more it is thus satisfactorily established that your intervener was legally appointed receiver and takes precedence and priority over any stockholders or any other person.

The plaintiff herein, however, in its answer to the petition of intervention, alleges that the appointment of your petitioner was at all times void, and it attempts to support this allegation by alleging facts the purpose of which is to substantiate a claim that the appointment was invalid because all the assets and properties of Behn, Meyer & Company had

been sold and the proceeds paid over to the Alien Property Custodian. From this it is argued that there was nothing of which Joseph could be receiver.

Your intervener in reply will show this honorable court that the properties and assets of Behn, Meyer & Company, Ltd., were never lawfully seized or set aside or paid over to the Alien Property Custodian or any other person, and that therefore Judge Harvey was entirely correct in finding that there were assets which the receiver might collect and administer.

Francis Burton Harrison, Governor General of the Philippine Islands and managing director for the Alien Property Custodian in the Philippine Islands, on the 19th day of February, 1918, seized the properties of Behn, Meyer. In the answer of the plaintiff in this present proceeding, on page 3, it is alleged that Harrison took possession of the property of Behn, Meyer & Company on behalf of the Alien Property Custodian. This is an error. Mr. Harrison may have taken possession of the property of Behn, Meyer & Company and in fact did so with armed force, but he did not do so on behalf of the Alien Property Custodian, as his action was repudiated by that official when brought to his attention. Mr. Harrison then applied for the issuance of a War Trade license to Behn, Meyer & Company, and this was done March 19, 1918, and W. D. Pemberton was appointed receiver or supervisor by the said Harrison. The legality of the issuance of this license will hereafter be discussed. At this point it is sufficient, and at the same time of essential importance to note that it was issued and forced on Behn, Meyer & Company and continued in force during the events now to be set forth.

The license having been issued, nothing more occurred for the next ten months. W. D. Pemberton pretended to continue to supervise the affairs of Behn, Meyer under the license, but he turned over no property; he did not even make the monthly reports which by the terms of license he was required to do if liquidation were in process. The next occasion when action was taken in regard to Behn, Meyer was January 2, 1919, when the process of the spoliation and looting of this company began in wholesale form.

On January 2, 1919, Douglas M. Moffat, by this time appointed Managing Director for the Alien Property Custodian in the Philippines, wrote to Menzi, the manager of Behn, Meyer & Company, as follows:

UNITED STATES OF AMERICA:

The Alien Property Custodian,

Office of the Managing Director in the Philippine Islands, Manila.

JANUARY 2, 1919.

DEAR SIR: A license authorizing the complete liquidation of the business of Behn, Meyer & Co., Ltd., in the Philippine Islands, was granted by the War Trade Board of the United States to the company under date of March 19, 1918. I am authorized to state to you that it is the desire of this office that the liquidation be completed under this license without further delay by you, acting under your power of attorney from the Company. The liquidation should be effected by Public sale held on approximately two weeks' advertisement. Otherwise the li-

cense will be revoked and the property sold at Public sale to produce the same effect, by this office under the Trading with the Enemy Act.

Yours very truly,

(Sgd.) DOUGLAS M. MOFFAT,
Managing Director for the Philippine Islands.

At this stage of the proceedings John Bordman appears as one of the principal actors. Bordman had been appointed in November, 1918, as official receiver for the Alien Property Custodian of Struckman & Company, and was also acting in the same capacity for several concerns, for all of which he was paid a monthly salary by the Alien Property Custodian. After Moffat had written his letter of January 2, Bordman resigns his position under Moffat on January 9th, and on January 23 purports to buy from Menzi all the property of Behn, Meyer, except the accounts receivable.

On that same day, January 23, Moffat again wrote Menzi as follows:

UNITED STATES OF AMERICA:

The Alien Property Custodian,

Office of the Managing Director in the Philippine Islands, Manila.

JANUARY 23, 1919.

DEAR SIR: Referring to our letter to you of the second inst., I am further authorized to state to you that it is the desire of this office that the accounts receivable, belonging to the business of Behn, Meyer & Co., Ltd., in the Philippines, be sold by you, acting under your power of attorney from the company and under the license for the liquidation of the business of Behn,

Meyer & Co., Ltd., granted by the War Trade Board of the United States. This sale may be made with our approval by private sale to Mr. John Bordman, who was the purchaser of the assets of the business at public sale thereof held by you, provided you find his to be the best offer obtainable. Otherwise, the license will be revoked and the accounts receivable sold by this office under the Trading with the Enemy Act.

Yours very truly,

(Sgd.) DOUGLAS M. MOFFAT,

Managing Director for the Philippine Islands.

Mr. J. M. Menzi, Manila, P. I.

Following this letter there was another bill of sale from Menzi to Bordman of all the accounts receivable.

These facts alone were sufficient ground for the receiver of Behn, Meyer to attack these sales as fraudulent. The entire properties of a company valued by the Alien Property Custodian at 1,400,000 ₱ (see Answer, page 6) had been sold for 600,000 ₱, less than half of its value, and accounts receivable of a face value of 436,948 ₱ had been sold for 60,000 ₱, less than one-seventh their value. Such transactions are intrinsically suspicious. Added to them, however, is the fact that Bordman, an employee of the Alien Property Custodian, resigned just after such order was made by the Managing Director for the Custodian and just before such sales are made, and who furthermore is designated by the Managing Director as the person to whom one of the sales can be made. The resignation of Bordman was obviously for the purpose of acting as a dummy to buy this property at such pretended sale.

Furthermore the Act of March 28, 1918, provides as follows:

> "Any person purchasing property from the Alien Property Custodian for an undisclosed principle or for resale to a person not a citizen of the United States or for the benefit of a person not a citizen of the United States shall be guilty of a misdemeanor * * * and the property shall be forfeited to the United States."

John Bordman did not purchase this property for himself; he transferred it after he had bought it to a company known as the J. M. Menzi Company, in which J. M. Menzi owned at least 50 per cent of the stock. Menzi was not a citizen of the United States. The purchase by Bordman was clearly for the benefit of Menzi since Bordman immediately transferred the property to a company in which Menzi had the majority interest.

Menzi, however, claimed, as he did in the sheriff's return, that the property had been taken over by the Alien Property Custodian, which was obviously untrue. The receiver at once attacked the validity of the whole transaction of the sale of the properties of Behn, Meyer & Company, by virtue of the Act above cited.

Under such circumstances the sales become more than suspicious. There is made out the clearest kind of *prima facie* case of fraud. All these matters existed at the time of Joseph's appointment as receiver, and they alone adequately justify that appointment. Indeed, having been appointed, the receiver, as was his duty to do, has filed suit in Manila against Menzi, Bordman, and the Bank of the Philippine Islands in which he attacks these sales as fraudulent and prays the court to order the return to Behn, Meyer & Co., Ltd., of the property out of which it was defrauded (see page 86 of the petition to intervene).

Turning from the transactions between Menzi and Bordman, and directing attention to the payment to the Alien Property Custodian of 660,000 ₱, which found itself in the possession of Menzi as a result of the alleged sale, it becomes apparent that this payment was invalid and illegal upon the face of it, and that the appointment of a receiver to set it aside and recover the money was amply justified.

On February 18, 1919, a demand was made upon Pemberton, as receiver of Behn, Meyer, in the following form:

> Mr. W. D. Pemberton,
> *Receiver Behn, Meyer & Co., Ltd.:*
>
> Address: Manila, P. I.
>
> I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the act of Congress known as the "Trading with the Enemy Act," approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act and by said executive orders, after investigation, do determine that:
>
> (Name of enemy or ally of enemy:) Behn, Meyer & Co., Ltd., whose address is (last known address:) Singapore, Strait Settlements, is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in all that certain money, and property mentioned and particularly described in your report to the Alien Property Custodian, dated February 19th, 1919, as owing or belonging to, or held for, by, on account of, or behalf of, or for the benefit of, the "person" hereinabove mentioned, together with all interest accrued thereon to date of payment to the Alien Property Custodian, and all dividends or accumulations thereon whatso-

ever now in your possession or which may hereafter come into your possession.

I, as Alien Property Custodian, do hereby require that the said money and property together with said dividends or accumulations shall be by you conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law.

The —— —— is hereby designated as depositary, and is authorized to receive for and on behalf of the Alien Property Custodian, the property herein mentioned, and upon the service of this demand on you by said depositary you are directed to deliver the said property to it forthwith. For money demanded, checks may be delivered to the depositary, which in all cases should be made payable to the Alien Property Custodian.

Witness my hand and seal of office, this 21st day of February, 1919.

A. MITCHELL PALMER,
Alien Property Custodian.
DOUGLAS M. MOFFAT,
(Sgn) By P. B. P.,
Managing Director for the Philippine Islands.

This demand upon its face is illegal and void. It was not made by the Alien Property Custodian; it was not made by any person authorized by him to make it; it is not signed by A. Mitchell Palmer; it is not signed by A. W. Moffat, although it purports to be signed for him, as his name appears on it "by P. B. P." This P. B. P. stands for P. B. Pope, who was a clerk in the office of the Alien Property Custodian in the Philippine Islands. The form of demand used is shown above and is A. P. C. Form #106B Demand For Money and Property. It is a form which sets out

certain extracts of the Trading with the Enemy Act (not set out above) and was printed in order that the clerks who did the actual manual labor in writing the forms would not make mistakes. It appears in this form three different times that the Alien Property Custodian may demand from a person holding property of any enemy not granted a license by the President. The demand states that Behn, Meyer & Co., Ltd., whose address is Singapore, Straits Settlements, is an enemy not holding a license granted by the President. This is so flagrant a perversion of the truth, that it is difficult to believe it was not deliberately done. On the 21st day of January, Menzi sold this property, reciting the terms of that license. Moffat, from whose office this demand issued, officially ordered him to sell on January 2, 1919, stating that he must sell under the terms of his power of attorney from the Company and under the terms of that license. The reason for stating that Behn, Meyer & Co., Ltd., was an "enemy not holding a license" is, however, sufficiently plain.

To justify a "demand" it is a sine qua non that the Alien Property Custodian, himself, made the "determination" that the person whose property is "demanded" is an "enemy." If the Alien Property Custodian "determines" that the "person" is "an enemy" then he may or MAY NOT issue a "demand." That is discretionary with the Alien Property Custodian, except where the "enemy" holds a War Trade Board License, or an "enemy" Trading License. If the person whom the Alien Property Custodian has "determined" to be an "enemy" holds an Enemy Trading License, granted under the same Act, then the hand of the Alien Property Custodian is STAYED and he cannot lawfully "demand" its property. As long as the War Trade Board License is un-

revoked the Alien Property Custodian is without any authority to "demand" the property of the licensee. The most he could do is order the Company wound up under the license.

In order, therefore, that the demand of February 18, 1919, might at least seem regular in part, it perforce had to state that Behn, Meyer was "an enemy not holding a license."

Behn, Meyer & Company, Ltd., held a license issued under the provisions of the Trading with the Enemy Act. This license was E. T. License No. 11291, and dated March 19, 1918. The Alien Property Custodian was, therefore, prohibited, by law, from demanding the property of Behn, Meyer & Co., Ltd.; and the demand was palpably illegal.

The void demand having been made, Pemberton paid over certain moneys, and received a receipt therefor in the following form:

UNITED STATES OF AMERICA:

The Alien Property Custodian.

OFFICE OF THE MANAGING DIRECTOR IN THE PHILIPPINES, MANILA.

February 28th, 1919.

MR. W. D. PEMBERTON,
Receiver Behn, Meyer & Co., Ltd., Manila, P. I.

DEAR SIR:

Report: 50426; Reporter: Behn, Meyer & Co., Ltd., Manila, P. I.
Trust: 50238; Enemy: Behn, Meyer & Co., Ltd., Singapore, S. S.

I wish to acknowledge receipt of ₱392,674.96 in this case, paid in answer to our demand dated February 21st, 1918.

Formal acquittance will be mailed you direct from our Washington office.

Yours truly,

DOUGLAS M. MOFFAT,
Managing Director for the Philippine Islands.
(Sgd.) By P. B. POPE.

This receipt was an instrument without force or effect whatever. It is not signed by Moffat, but by the same P. B. Pope who initialed the demand. This clerk Pope had no authority to give any acquittance which could relieve Pemberton of his duty to account for the money of Behn, Meyer, and this he knew, as he says such acquittance will be mailed from Washington. No such acquittance ever was mailed.

Furthermore, it should be noted that the demand and receipt together are redolent of fraud because had this been a bonafide transaction some authorizeed bank or trust company would have been named as depositary to whom the enemy funds should be paid. This was not done. The space in the "demand" for the insertion of the name of the depositary was left blank.

Now under this state of facts, every one of which had happened before the appointment of Joseph as receiver, can it be doubted that his appointment was not justified. A large sum of money had been withdrawn from Behn, Meyer & Co. and paid over to the Alien Property Custodian upon a demand clearly void, and for this money no valid acquittance could be shown. The property is apparently disposed

of under a War Trade License, the proceeds of that property are disposed of by a procedure which can only obtain a semblance of legality by denying the existence of that license. The purpose of making this demand of February 18, 1919, is clear. Section (2) (c) of the Executive order of February 26, 1918 provides:

> "Any demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest and estate in and to the possession of the money or other property demanded and such power or authority thereover as may be included within such demand."

The purpose, therefore, in issuing this demand was to obtain title for the Alien Property Custodian in the sums of money then in the possession of Menzi, as managing director of Behn, Meyer & Company. But the fact that it was made is a striking corroboration of the contention of your intervener, which will next be considered, that the War Trade License issued to Behn, Meyer February 19, 1918, was void from the beginning. If that license had been valid there would have been no need to employ the machinery of a "demand" to bring all the proceeds of the sale of Behn, Meyer assets into the hands of the Alien Property Custodian. Under the license they could have been paid to no one else. Not only was the "demand" superfluous; it could not be used where a license existed. There can, therefore, be but one explanation of the issuance of this demand. The men intent on obtaining possession of the property of Behn, Meyer knew the War Trade License was not valid. They knew that it was no authority for the disposition of the property of Behn, Meyer,

and that ultimately that disposition could be set aside and the property recovered. For no other reason would they have resorted to the "demand," whose only function could be to vest in the Alien Property Custodian title to the property of Behn, Meyer.

Thus far it has been shown that Judge Harvey was fully justified in appointing a receiver for Behn, Meyer because upon their face both the sale to Boardman and the payment to the Alien Property Custodian bore all the marks of fraudulent transactions which ought to be set aside.

There remains to be considered the War Trade License issued to Behn, Meyer. The plaintiff herein contends in its answer that all the property of Behn, Meyer having been disposed of validly under that license there was nothing for the receiver to administer, and his appointment was consequently improper. The answer of the plaintiff on page 3 alleges that this license was issued to facilitate the carrying and liquidation of Behn, Meyer & Company by the Alien Property Custodian. It, however, can have been issued for no such purpose in view of the fact that the Alien Property Custodian had repudiated the acts of Harrison in seizing the company and had thereby equally repudiated the idea that Behn, Meyer & Company was an enemy or the ally of an enemy.

Indeed, the issuance of this War Trade License and the appointment of W. D. Pemberton as supervisor of Behn, Meyer & Company was a wholly unwarranted and illegal proceeding. Section 4, Trading with the Enemy Act, provides that an enemy may apply for a license, and regulates the issuing, suspension, and revoking of such licenses. Section 7 (*c*) of the Trading with the Enemy Act provides that there

shall be paid to the Alien Property Custodian money, etc., belonging to an enemy or an ally of an enemy not holding a license granted under this act. The issuing of a license to one not an enemy was a purposeless proceeding. If it was taken in good faith by Harrison in this instance it was done so upon the mistaken idea that Behn, Meyer & Company was an enemy. If, however, Behn, Meyer & Company was not an enemy the action of issuing the War Trade License was wholly illegal and unwarranted.

It is submitted that Behn, Meyer & Co., Ltd., of Singapore is not and was not an enemy or the ally of an enemy, but on the contrary is "a corporation organized or incorporated within any country other than Germany, Austria, Hungary or Austria-Hungary, and that the control of * * * such corporation, was at such times, and is at the time of the return of the money or other property vested in citizens or subjects of nations, states or free cities * * *" other than the enemy countries named.

Treaties.

Article 14 of the Treaty between the United States of America and His Britanic Majesty of 1794, and commonly referred to as the "Jay Treaty," is as follows:

> "There shall be between all the dominions of His Majesty in Europe and the territories of the United States, a reciprocal and PERFECT LIBERTY of commerce and navigation. The people and inhabitants of the two countries, respectively, shall have liberty freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places and

> rivers, within the dominions and territories aforesaid, and to remain and reside there, without any limitation of time. Also to hire and possess houses and warehouses for the purpose of their commerce, and generally the merchants and traders on each side shall enjoy the MOST COMPLETE PROTECTION and SECURITY for their commerce; BUT SUBJECT ALWAYS as to what respects this article to the LAWS and STATUTES of the two countries respectively."

The declaration affording reciprocal protection to trade-marks between the United States of America and the government of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland of 1877 is, in part, as follows:

> "The subjects, OR CITIZENS of each of the contracting parties shall have, in the dominions and possessions of the other, the same rights as belong to native subjects, OR CITIZENS, or as are now granted or hereafter may be granted to the subjects, and CITIZENS of the most favored nation, in everything relating to property in trade-marks and trade labels.
>
> "It is understood, that any person, who desires to obtain the aforesaid protection must fulfill the formalities required by the LAWS of the respective countries."

Article 5 of the treaty between these two countries, and which is referred to as the Hay-Pauncefort Treaty of 1899, as to the Convention and as to the tenure and disposition of real and personal property, is as follows:

> "In all that concerns the right of disposing of every kind of property, real or personal, CITIZENS OR subjects of each of the High Contracting parties,

> shall in the dominions of the other enjoy the rights which are, or may be accorded to the CITIZENS or subject of the most favored nation."

It is to be observed that in these latter treaties and conventions the CITIZENS of the respective countries have been distinguished from SUBJECTS—subjects who may be citizens as well in person as in law—and citizens who may be persons in law but not entitled to certain rights of natural persons and subjects.

The Department of State has certified that the Straits Settlements has acceded to the Convention of 1899, page 777, Senate Documents, Vol. 47; Treaty and Conventions, Vol. 1.

The Treaty or Convention of Commerce and Navigation between the United States of America and His Brittanic Majesty of 1915, in its article first, states the following:

> "There shall be between the territories of the United States of America, and all the territories of His Brittanic Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain in and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purpose of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

This article, together with the "most-favored-nation" clause of the Hay-Pauncefote Treaty justifies counsel in asserting the right accorded CORPORATION, limited liability, and other companies and associations of Russia and Siam, for the benefit of Behn, Meyer & Company, Ltd., a Corporation and CITIZEN of Great Britain. The agreement with Russia of 1904 is as follows:

> "The Government of the United States and the Imperial Russian Government having judged that it would be mutually useful to regulate the position of CORPORATIONS or stock companies and other commercial associations, industrial or financial, the undersigned by virtue of the authority which has been vested in them, have agreed as follows:
>
> 1. Corporations or stock companies and other industrial or financial commercial organizations, DOMICILED IN one of the two countries, and on the condition that they have been regularly organized in conformity to the laws in force in that country, shall be recognized as having a legal existence in the other country, and shall have therein especially the right to appear before the courts whether for the purpose of bringing an action or of defrauding themselves against one.
>
> 2. That in all cases the said Corporations and companies shall enjoy in the other country the same rights which are or may be granted to similar companies of other countries.
>
> 3. It is understood that the foregoing stipulation or agreement has no bearing upon the question whether a society or Corporation organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the regulations in this respect existing in the latter country.

This agreement shall go into force on the 25/12 of June, 1904, and shall only be discontinued one year after its denunciation shall have been made by one of the parties to the agreement."

Articles 4 and 5 of the treaty with Siam, done at Washington on the 16th day of December, 1920, is as follows:

"The CITIZENS or subject of each of the High Contracting Parties shall have free access to the courts of Justice of the other in pursuit and defense of their rights; they shall be at liberty, equally with the native CITIZENS or subjects, and with the CITIZENS or subjects of the most favored nation, to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts.

"There shall be no conditions or requirements imposed upon American citizens in connection with such access to the Courts of Justice in Siam, which do not apply to native citizens or subjects of the most favored nation.

"Limited-liability and other companies and Associations already or hereafter to be organized in accordance with the laws of either High Contracting Party and DOMICILED in the territories of SUCH PARTIES, are authorized, in the territories of the other, to exercise their rights, and appear in the Courts either as plaintiff or defendants, subject to the laws of such other party.

"There shall be no conditions or requirements imposed upon American CORPORATIONS, companies or associations, in connection with such access to the Courts of Justice in Siam, which do not apply to such native CORPORATION, companies or associations, or to corporations, companies or associations of the most favored nation."

These citations from the treaties of the United States Government is the law—the fundamental law—taken together with the Declaration of Independence, the Articles of Confederation, and the Constitution.

Assistant Attorney General Warren, of the United States, who had the Trading with the Enemy Act in charge for the Government before its passage by Congress, stated (hearings before Subcommittee on H. R. 4960, 189):

> "We have specifically abstained in the Bill from attempting to go behind the corporate charter. If the corporation is an American corporation, then it can do business in this country. * * * In England they attempted to go behind the charter of an English corporation and they attempted to hold that an English corporation which was controlled by German stockholders was an enemy within the purview of their act, and they landed in inextricable confusion. * * * Here we have solved that by saying that we will not go behind the corporate charter, no matter how many German stockholders there may be."

The "Trading with the Enemy Act" within itself has established a clear and comprehensive policy for dealing with enemies, their allies, property, debts, and corporations, and was meticulous in defining some of the chief terms used therein.

For the purpose of our investigation the word "person" is defined as meaning any "corporation or body politic." Section 2, paragraph *c*.

The word "enemy" or "ally of enemy" is defined to mean "any incorporation incorporated within such territory of any

nation with which the United States is at war or incorporated within any country other than the United States and DOING BUSINESS WITHIN SUCH TERRITORY."

It is not even claimed that Behn, Meyer & Co., Ltd., was incorporated within any territory of any nation with which the United States is at war.

This corporation was incorporated within a British colony and is, therefore, a corporation incorporated in a country at least friendly and neutral, if not allied, in the war. Behn, Meyer & Company, Ltd., was a corporation incorporated within a country other than the United States, but Behn, Meyer & Company, Ltd., was not "doing business within any such territory."

Behn, Meyer & Company, Ltd., has never been proclaimed by the President of the United States as "enemy."

These are the essential requisites to "enemy" status under the Trading with the Enemy Act. They are a condition precedent to even declaring the corporation an "enemy." Behn, Meyer & Co., Ltd., was then, and still is, to the present date, licensed as a British corporation to do business in the Philippine Islands by the Government of the United States, acting through its insular officials. This license has never been revoked or canceled.

When dealing with the matter of enacting legislation for the purpose of regulating the trading with the enemy, Congress of the United States had before it both the British statutes and the French statutes. Congress knew that it had been enacted by the British Parliament that a company with one-third of its stock enemy-owned should be subject to investigation by the Board of Trade (4 & 5 Geo. V, c. 87, sec. 2), and that if it appeared to the Board of Trade

that the control or management of the company had been so affected by the state of war as to make that course expedient, then the Board was authorized to have a controller appointed to take over the company's business and property (*id.*, sec. 3), or, if it saw fit, to have the company wound up (5 & 6 Geo. V, c. 105, sec. 1).

It had also previously been held in France, on the other hand, that a company incorporated there or in Brazil was not an enemy, no matter who were its stockholders. Rouen, 1st Chambre, Nov. 8, 1915, Clunet, Jour. de droit int., 253, 1916; Rouen, 1st Chambre, Jan. 19, 1916, Gaz. des trib., Mar 30, 1916.

It is submitted that if the national character of stock ownership of any corporation had appeared to Congress to be important in the case of any corporation, American, allied, or neutral, Congress would have plainly and unequivocally so provided, and not have limited the criteria of "enemy" character, as it indisputably did in section 2 of the act, solely and exclusively to (1) residents in enemy territory, (2) incorporated therein, and (3) the doing of business therein. Congress has steadily maintained its intention not to make the personnel of the stockholders any test of "enemy" status in respect to any corporation whatsoever. Any other construction is wholly inconsistent with the other provisions of the act and with its general plan.

The records of Congress show that on June 4, 1918, both Mr. A. Mitchell Palmer, then the Alient Property Custodian, and Mr. Lee C. Bradley, his general counsel, appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives in support of certain proposed amendments to the Trading with the Enemy Act. These

were in a large part embodied in the bill then before that committee (H. R. 12338, 65th Congress, 2d Session).

The following is an excerpt from the hearings referred to (p. 56):

> "The Chairman: Now what is the next (amendment of the act which you advocate), Mr. Bradley?
>
> "Mr. Bradley: 'Sub-section (*d*), near the bottom of page 49 (which) is copied from the English act. It reads:
>
> "'(*d*) The Alien Property Custodian shall have power to appoint a managing agent, or the District Court of the United States for the District within which the property hereinafter specified or the major portion thereof may be located, upon the application of the Alien Property Custodian shall have power to appoint a receiver, who shall under such restrictions and conditions as the Alien Property Custodian or the District Court, respectively, may from time to time prescribe, receive, hold, carry on, conduct, manage, liquidate, pledge, mortgage, or sell the property of any person, firm, corporation, or association owned or controlled, directly or indirectly, by, for, in behalf of, for the benefit of, or in the interest of any enemy or ally of enemy in any property, firm, corporation, or association.'
>
> "That goes much further than any other provision of the Trading with the Enemy Act, in that it would authorize the seizure and the ultimate disposition of the entirety of a property which was controlled by the enemy, although he might not be the complete owner of it.
>
> "Mr. De Walt: How does that compare with the provision that you had in the amendment to the deficiency bill (*i. e.*, the amendment of March 28, 1918)?

> "Mr. Bradley: There was nothing at all in that about this. That just authorized the sale of what belonged to the enemy."

But the significant fact is that Congress refused to enact any such amendment.

At the next session of Congress (65th, 2d Session), Mr. Lee C. Bradley, counsel general of the Alien Property Custodian, appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives in connection with a proposed amendment to the Trading with the Enemy Act (H. R. 12338) and stated that (Hearings, p. 24)—

> "The American corporation is never an enemy. The status of the Alien Property Custodian in respect of the American corporation is that merely of a stockholder. What he does when he seizes the enemy stock is to demand representation on its board of directors."

On July 18, 1918, Hon. John W. Davis, as Acting Attorney General of the United States, rendered an opinion upon the subject to the Alien Property Custodian. The latter had inquired as to his right to act against an American corporation which was the owner of a patent and a majority of whose stockholders were German. If such a corporation was an "enemy," he could seize its property and its patent; otherwise he could take only the stock interest of the German stockholders, but not the patent, which belonged to the corporation itself. The Acting Attorney General ruled against this attempt to condemn such a corporation as an "enemy" and capture its corporate property. He held that:

> "The meaning of the word 'enemy' as used in this Act is defined in section 2. That part of the definition which deals with corporations is as follows: 'Any cor-

poration incorporated within such territory of any nation with which the United States is at war, or incorporated within any country other than the United States and doing business within such territory.'

"I am of the opinion that this enumeration of enemy corporations was intended to be exhaustive and that under no circumstances can an American corporation be held to be an enemy within the meaning of this act."

The situation with regard to Behn, Meyer & Co., Ltd., a British corporation, guaranteed as it is by the solemn treaties of the United States of America, and any American or domestic corporation is precisely and exactly the same. Russia is today specifically refused recognition by the United States of America because her officials and authorities refuse to adhere to the terms of the treaty and convention cited herein. The President (President Coolidge) of the United States, in his message to Congress of the United States last December, stated with reference to the Russian situation and the ignoring of its treaty obligations and failure to return property seized of citizens of the United States:

"Our diplomatic relations, lately so largely interrupted, are now being resumed, but Russia presents notable difficulties. We have every desire to see that great people, who are our traditional friends, restored to their position among the nations of the earth. We have relieved their pitiable destitution with an enormous charity. Our Government offers no objection to the carrying on of commerce by our citizens with the people of Russia. Our Government does not propose, however, to enter into relations with another régime obligations. I do not propose to barter away for the privilege of trade any of the cherished rights

of humanity. I do not propose to make merchandise of any American principles. Those rights and principles must go wherever the sanction of our Government go.

"But while the favor of America is not for sale, I am willing to make large concessions for the purpose of returning to the ancient ways of society can be detected. But more are needed. Wherever there appears any disposition to compensate our citizens who were despoiled, and to recognize that debt contracted with our Government, not by the Czar, but by the newly formed Republic of Russia; whenever the active spirit of enmity to our institutions is abated; whenever there appear works mete for repentance, our country ought to be the first to go to the economic and moral rescue of Russia. We have every desire to help and no desire to injure. We hope the time is near at hand when we can act."

John Basset Moore, in his incomparable work on International Law, on pages 800 *et seq.*, vol. III, treats of foreign corporations, and especially between the United States and Great Britain:

"Corporations, under the treaties between the United States and Great Britain of 1783 and 1794, are entitled in respect of security for their property, to the same rights as natural persons." Moore's International Law Dig., pp. 800, Vol. III. Society for the propagation of the Gospel *vs.* New Haven, 8 Wheat., 464.

"There is indisputable legal presumption that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, * * *. That doctrine began, as we have seen, in the assumption that State

corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this Court, it was settled that the presumption was one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it." St. Louis & San Francisco Railway Co. *vs.* James (1896), 106 U. S., 545-562-563.

"A British railway corporation, considering itself aggrieved by the action of the British Colonial authorities, addressed a memorial to the British government. The Government of the United States was requested, in behalf of an American corporation, to support the latter's memorial. The United States answered that the railway company, in whose name the memorial was presented, being a British corporation, could not call upon the United States to intervene in its behalf with the British authorities, but that there was 'a more substantial reason for the refusal than that of the distinction between a corporation and its shareholders. It is an established principle that where a State creates a corporation and confers upon it franchises and obligations of an important public character, such as the operation of a railroad, the company intrusted with these privileges and duties is not allowed, without the consent of the government from which it derives its existence, to transfer them to others. This general principle may be to some extent evaded in the case of an incorporated company by the transfer, not of the property itself, but the shares of stock in the corporation. But the mere transfer of shares between individuals does not effect the complete subjection of the corporation itself

to the government which created it. That government still retains all the powers of regulation and legislation in respect to the corporation, its rights, privileges and franchises, which it would have had, had there been no transfer of shares. Any attempt by the government of persons holding a portion or even the whole of the shares of a corporation, with the government which created it and within whose limits its operations are conducted, would be an infringement of the principle above referred to.' Mr. Uhl, Act. Sec'y of State, to Mr. Wesson, April 29, 1895, 214 M. S., Dom. Let. 696.

"Henry Chauncey, a citizen of the United States, and two other persons, also such citizens, made a claim against the Chilean government as surviving members of the firm of Allsop & Company. The claim was based on alleged interference by the Chilean government with certain property or property rights, which were transferred in 1875 to that firm, and which, the firm having gone into liquidation, were embraced in a contract of settlement in 1876 between the liquidating partner of the firm and the government of Bolivia. Subsequently on the death of the partner in question, Mr. Chauncey became the liquidator of the firm, and as such liquidator he appeared as the firm's representative in presenting the claim. It appeared that the firm was formed in 1870 under the laws of Chili, with its domicile at Valparaiso, and that it constituted under those laws a society or partnership en commandite, which constitutes under the law of Chile, which is based on the civil law, a juridical person or entity distinct from its individual members. On this ground it was held that the firm was to be considered for international purposes as a citizen of Chile, and was therefore incapable of prosecuting

through its representatives a claim against Chile as a citizen of the United States before an international commission." Moore's Int. Law Dig., Vol III, p. 802. See also: Henry Chauncey *vs.* Chile, No. 3, United States and Chilean Claims Commission (1901), citing Code of Chile, tit. 28, art. 2053; Calvo, Droit International II, 227, 399; Smith *vs.* McMicken, 3 La. Ann., 322; Liverpool Nov. Co. *vs.* Agar, 14 Fed. Rep., 615; Wharton's Int. Law Dig., II, 528; Field's Int. Code, art. 545; Miller *vs.* Dows, 94 U. S., 445, and other cases therein cited.

United States Courts.

"It is elementary that a foreign corporation is one that derives its existence solely from another state, corporation or country. This term, "a foreign corporation," is used indiscriminately to designate either corporations created under the laws of another State of the American Union or a corporation created by or under the laws of a foreign country."

"It must dwell in the place of its creation and it cannot migrate to another sovereignty." Sec. 3927, 14 A, *Corpus Juris.*

"A corporation can exercise none of its functions and privileges conferred by its charter in another state or country except by the comity and consent of such state or country. The rights and immunities of stockholders of foreign corporations are within the rule of comity and must be respected. They cannot be held individually liable, for instance, for the debts or torts of the corporation unless they are made so by its charter or by some statute." Sec. 3931, *Corpus Juris,* 14 A.

"One result of the doctrine that it cannot migrate but must dwell in the place of its creation is that a

corporation, in so far as it can be regarded as a 'citizen,' 'resident,' or 'inhabitant,' as it may be for the purpose of jurisdiction and for many other purposes, is a 'citizen,' 'resident' or 'inhabitant' of the state or country by or under the laws of which it was created and of that state or country only. Sec. 3933, 14 A, *Corpus Juris;* 240 U. S., 642.

"Every power that a corporation exercises in another state depends on its validity upon the laws of such state, and a corporation can make no valid contract without their sanction express or implied." Sec. 3945, 14 A, *Corpus Juris.*

"A corporation cannot exercise any powers in other states unless its charter or the governing law of its existence authorizes it so to do, and in the absence of such authority the corporate acts and contracts done or made beyond the limits of the state are void. The charter and governing laws of the state in which the corporation is created determine the rights and liabilities of the stockholders." Hudson River Pulp, etc., Co. *vs.* Warner, 99 Fed., 187.

"Hence to determine the capacity or disability of the corporation in a given case regard must primarily be had to the laws of the state or sovereignty from which it has derived its franchise." 25 L. R. A., 358.

"By doing business away from their legal residence they (corporations) do not change their citizenship but simply extend the field of their operations, they reside at home but do business abroad." Balt., etc., R. R. Co. *vs.* Koontz, 104 U. S., 511.

"The establishment of a branch in a place other than the domicile does not affect the domicile which remains as fixed as the statutes under which the corporation was created." Philippine Sugar Estates Development Co. *vs.* United States, 39 Ct. Cl., 225,

"The stock of a corporation is not within the state

because its agent has property there and is doing business within this state." Plimpton *vs.* Bigelow, 93 N. Y., 592.

"The corporation created by or under the laws of a foreign country is an alien in any other country although most all of its stockholders may be citizens or subjects of the latter country." Jansen *vs.* Diefontein Consolidated Mines, 1902, A. C., 484; 5 B. R. C., 610.

"The validity of the incorporation of foreign corporations is a question of law, depending on the law of the state of its domicile. A certificate that a corporation is entitled to commence business issued under the English company's consolidation act is conclusive of such right as to all matters both of fact and law." Lindenburger Cold Storage, etc., *vs.* J. Lindenburger, Inc., 235 Fed.

In this connection it is pointed out that Behn, Meyer & Company, Ltd., was organized under the Company's Ordinance, of Singapore, Straits Settlements, of 1889, which is analogous to the English Company's Consolidation Act of 1908, and that the proper authority or official of the British Government in Singapore has issued his certificate to that effect. It is therefore conclusive according to the Federal courts of the United States of America.

The opinion of the Attorney General of the United States, Wickersham, rendered July 11, 1911, held that in the Act of Congress of 1825 Congress declared a corporation of the United States a "citizen" thereof within the meaning of the navigation laws. "Therefore," says the opinion, "a vessel belonging to a domestic corporation is owned by a citizen of the United States, even though some of the stock in that corporation belongs to aliens; alien stockholders have

neither the legal nor equitable ownership of any part of the vessel. As said by the Supreme Court of the United States in Humphreys *vs.* McKissock (140 U. S., 304, 312):

> "Both the commisioner and the court * * * seem to have confounded the ownership of stock in a corporation with the ownership of its property. But nothing is more distinct that the two rights; the ownership of one confers no ownership of the other. * * * The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it."

Except through the payment of dividends out of surplus profits, the property of a Philippine Islands corporation can pass LAWFULLY to its stockholders only through a distribution of its assets made under JUDICIAL proceedings AFTER ALL DEBTS of the corporation have been paid and satisfied in full.

Behn, Meyer & Company, Ltd., was admitted into and licensed to do business within the Philippine Islands under the laws of the Philippine Islands. The corporation met the requirements of the law for choses in action, as these supply the property, if any is necessary under Philippine law, to support the receivership. A chose in action is personal property. (32 Cyc., 669.)

Finally, the statute under which this receiver was appointed requires the appointment of receiver where certain conditions exist, which the court here found as a fact did exist. The existence of property within the jurisdiction is not necessary, provided, there is anything the receiver can do in the premises. This condition is here met by the claims against Menzi, Bordman and the Alien Property Custodian, which the receiver is now pursuing. The whole of

the properties of this company having been looted and stolen by Menzi with the aid of Bordman and the Bank of the Philippine Islands, the receiver is now at Manila proceeding in equity against them, charging them with the fraud they have committed and seeking to recover from them, not merely the pittance which is involved in this present case, but the entire estate of the company. (See page 86 of motion to intervene.) At the same time he has filed, within the allotted time, a claim with the Alien Property Custodian, not for $10,000.00, as alleged in the answer of the plaintiff, but for every dollar which once belonged to Behn, Meyer & Co., a part of which, under one subterfuge or another, was paid over to the Alien Property Custodian, and the remainder of which was stolen by Menzi and his co-conspirators, as set out above.

And this honorable court is here reminded that if a receiver had not been appointed, no one would ever have attempted to recover the properties of Behn, Meyer & Company for those rightfully entitled to them. Menzi, who was its trusted manager, would not do so, for he is even now enjoying the proceeds of his dishonesty and theft. Harrison, Pemberton, Moffat, and Pope who in one official capacity or another, were charged with the protection of this company's assets, all of them, directly or indirectly, deliberately or through inadvertence, contributed to the dissipation of those assets. The herein plaintiffs, although they represent themselves to be the company, have made no attempt to recover the vast properties the company lost in the Philippine Islands, but have contented themselves by bringing this suit for a few hundred thousand dollars, which, if the plaintiffs succeed herein, will never go to the home office of the

company at Singapore or to the judgment creditors in Manila, but will be carried away to Germany, where not one dollar of it will ever be applied for the benefit of Behn, Meyer or its creditors. It was not to preserve the estate of Behn, Meyer that this suit was brought under an alleged power of attorney, the circumstances of whose execution were never disclosed to the court until this intervention by the receiver, appointed by the court in Manila, was brought, who alone has done all that has been done to recover the squandered properties and assets of this company and who alone has informed this court of the controlling facts in this case.

Therefore we submit that Lazarus G. Joseph was properly appointed receiver of Behn, Meyer & Company, Ltd.

(2) *The Removal of Lazarus G. Joseph Was Improper.*

The removal of Lazarus G. Joseph was the result of a motion to intervene in the receivership proceedings in the Philippine Islands in the case of Behn, Meyer & Company *vs.* Stanley *et al.* by Menzi, Bordman, and the Bank of the Philippine Islands. It is submitted that it is patent upon the face of the proceedings that the removal was improper and cannot be sustained.

After Lazarus G. Joseph had been appointed receiver by Judge Harvey, on August 10, 1922, he commenced to try and collect the assets of the company. He first filed a suit against the Hamburg-Amerika line to revive a judgment recovered by Behn, Meyer against the line in October, 1917. This case came on to be heard before Judge S. del Rosario in the Court of First Instance, Manila, Messrs. Crossfield & O'Brien, attorneys for the line, attacking the jurisdiction

of the court and demurring to the complaint. Their contentions were overruled; they appealed to the Supreme Court of the Philippine Islands, and judgment of that court reversing the lower court, as set up on page 14 of the plaintiff's answer to this motion. The effect of that decision on the instant case will hereafter be referred to; and at this point suffice it to say that in May, 1923, four months before the action of Judge Diaz in removing the receiver appointed by Judge Harvey, another judge of the Court of First Instance, Judge del Rosario, had refused to interfere with that appointment.

In this case of Joseph *vs.* Hamburg-Amerika line, Joseph asked the court to order Menzi to produce the books of Behn, Meyer. The court refused to issue the order, though not on the ground that Joseph was not receiver for Behn, Meyer, as the court held he was.

The receiver then requested Menzi to deliver the books of Behn, Meyer to him by letter, as follows:

MANILA, P. I., *August 1st*, 1923.

Mr. J. M. MENZI,
Manila, P. I.

SIR: As the receiver of Behn, Meyer & Co., Ltd., and inasmuch as you have testified in Court that the books of accounts of the said firm are in your possession, will you kindly turn the same over to me.

As receiver of Behn, Meyer & Co., Ltd., I am the legal depositary of the said books and request that you indicate the time when I may go to your office to receive the said books.

Very respectfully,
(Sgd.) LAZARUS G. JOSEPH,
Receiver for Behn, Meyer & Co., Ltd.

This Menzi refused to do by letter, as follows:

MANILA, P. I., *August* 3, 1923.

Mr. LAZARUS G. JOSEPH,
Manila, P. I.

DEAR SIR: I beg to acknowledge receipt of your letter of August 1, 1923, requesting me to turn over to you the books of accounts which formerly pertained to Behn, Meyer & Co., Ltd.—I regret to inform you that I cannot comply with your request as these books pertain to the business which was formerly purchased (by John Bordman from the Alien Property Custodian of the United States), and were relivered by the Alien Property Custodian to him, as evidence of the outstanding accounts of the business of Behn, Meyer & Co., Ltd., which were purchased by the said John Bordman. These outstanding accounts are being liquidated, and it is unnecessary for me to say that these books are necessary as evidence and in liquidation of these accounts. Furthermore, I cannot recognize your right to have possession of these books; first, for the reasons which I have above stated, and secondly, that I do not consider you, under the law, as the legally appointed receiver for the business of Behn, Meyer & Co., Ltd., as that business was liquidated by the Alien Property Custodian of the United States, and finally sold. You will recall that in the case which you brought against the Hamburg-Amerika line, your counsel requested the court to turn over these books to you, which request was denied by the court.

Yours respectfully,

(Sgd.) J. M. MENZI.

Thereupon, on August 31st, the receiver filed his suit against Menzi, Bordman, and the Bank of the Philippine Islands,

above referred to, in which he sets up the fraud perpetrated by them and prays for the recovery of the property. (See page 37 of motion.)

Four days later, on September 5, the receiver applied to the court, at this time presided over by Judge Diaz, for a rule to show cause, directed to Menzi, why he should not produce the books of Behn, Meyer. On September 13 Menzi replied to the rule stating:

> (1) That February 16, 1918, all the assets of Behn, Meyer were seized by the Alien Property Custodian and were thereafter sold to John Bordman for 660,000 ₱.
>
> (2) That 392,674.96 ₱, proceeds of this liquidation, were turned over to the Alien Property Custodian.
>
> (3) That Joseph is not the legally appointed receiver for Behn, Meyer.
>
> (4) That Joseph has sued Menzi to recover the assets of Behn, Meyer. (See page 49 of motion.)

The next day, September 14th, 1923, Menzi, Bordman, and the Bank of the Philippine Islands filed a motion to intervene in the case of Behn, Meyer *vs.* Stanley, being the case in which Joseph was appointed receiver for the sole ground of moving to vacate the order of August 10, 1922, in which he was appointed. (See page 57 of motion.) The motion to vacate the order sets up the following matters:

> (1) That the Alien Property Custodian took over the assets of Behn, Meyer February 1[illegible], 1918, and sold them to Bordman in January, 1919.
>
> (2) That Behn, Meyer originally brought the suit; that Jureidini intervened, recovered judgment,

and, with knowledge of the alleged liquidation of Behn, Meyer, had Joseph appointed receiver.

(3) That by law Jureidini's only remedy was to apply to the Custodian or the Treasurer of the United States for payment out of the moneys held by them.

(4) That therefore Judge Harvey had no jurisdiction to appoint Joseph receiver. (See pages 58-66 of motion.)

Joseph, on September 17, 1923, filed an opposition to the above motion in which he sets up the following matters:

(1) That the interveners have no interest in the subject-matter of the suit, but are strangers to the proceeding.

(2) That they cannot intervene to attack the jurisdiction.

(3) That the receiver was properly appointed under the statutes of Philippine Islands. (See pages 71-75 of motion.)

On September 26, 1923, Judge Diaz granted the motion to intervene, and also vacated the receivership for the following reasons:

(1) The property of Behn, Meyer had been seized by the Alien Property Custodian and sold to Bordman.

(2) Therefore Judge Harvey had no jurisdiction to appoint a receiver for Behn, Meyer.

It is submitted that such proceedings as the above disclose upon their face the invalidity of the removal of Joseph as receiver, and Judge Diaz's decision cannot be supported either as to the facts it attempts to find or as to the law it seeks to apply.

In regard to intervention, the Philippine Code provides as follows:

> "INTERVENTION.—A person may, at any period of a trial, upon motion, be permitted by the Court to intervene in an action or proceeding, if he has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both. Such intervening party may be permitted to join the plaintiff in claiming what is sought by the claimant, or to unite with the defendant in resisting the claims of the plaintiff, or to demand anything adverse to both the plaintiff and defendant. Such intervention, if permitted by the Court, shall be made by complaint in regular form, filed in court, and may be answered or demurred to as if it were an original complaint. Notice of motion for such intervention shall be given to all parties to the action, and notice may be given by publication, in accordance with the provisions of this title relating to publication, in cases where other notice is impractical."

It will thus be noted at the outset that neither of the parties were notified as provided by the Code of Civil Procedure, nor was the provisions of the code followed in filing their complaint in regular form. None of the interveners nor their attorneys appeared as friend of the Court. None of the due process of law as provided in the above quoted section of the Code of Civil Procedure was followed by the lower Court.

The lower Court denied to the Receiver and to A. N. Joureidini & Bros. any of the equal protection of the law in denying them the time or the right to file a demurrer to the pleading of the interveners. The motion to intervene was filed on September 14, 1923, and was heard by the court

on September 15, 1923, and without rendering any decision on the motion to intervene, separately, the lower court, without advising the parties to the case, and giving them the protection "in regular form" to answer or demur to the pleading of the interveners, proceeded to render its decision on September 23, 1923, denying its jurisdiction; allowing the interveners to intervene; not requiring them, or any of them, to file in court, by complaint in regular form, such intervention, but in entire disregard to the statute made a finding of facts against the receiver and the parties to the case, and denied the motion of the receiver, and dismissed the receivership proceedings.

Such is not due process of the law nor the equal protection of the law, which the parties to the case have a right to expect and which the law gives them the right to demand. Had the Court decided that the interveners had the right to intervene it should have so decided and then ordered that the interveners file their complaint in the Court in regular form, as if it were an original complaint, and the parties would have had an opportunity, in accordance with this particular law, as well as with the general rules of practice and procedure, to either demur to the complaint of the interveners or to answer, or to file such other proper pleading as called for. But nothing of this nature was allowed by the lower Court. All the constitutional guarantees of the parties to this suit were completely ignored, the rules of the Courts of the Philippine Islands were disregarded, and the provisions of the Code of Civil Procedure in force in the Philippine Islands were set at nought by the lower Court when it decided the question to intervene on September 23, 1923, and December 3, 1923.

The court was entirely without jurisdiction to decide the questions presented to the motion to vacate the order of the lower court of August 10, 1922, appointing the receiver. The only questions which the court at that time was authorized to decide was the motion of the receiver to have J. M. Menzi deliver possession of the books of account of the firm of Behn, Meyer & Company, Ltd., to the receiver appointed by the court for the assets, property and estate of that firm, and not the question of the motion requesting permission to intervene.

A consideration of the motion to set aside the receivership, and the motion requesting permission to intervene, shows conclusively that the sole and only interest which the interveners had in the case was to have the receivership proceedings terminated, and to leave the judgment creditor in exactly the same position as he was in January 23, 1917, when the case was originally filed, and without any remedy at law or equity whatsoever. The motion to set aside the order appointing a receiver for the property, assets, and estate of Behn, Meyer & Company, Ltd., recites the fact that the receiver had at that time filed a complaint in the Court of First Instance of Manila against the three interveners, John Bordman, J. M. Menzi, and the Bank of the Philippine Islands, charging them with having transferred property of Behn, Meyer & Company, Ltd., to themselves illegally and fraudulently.

> "One to whom property is transferred in violation of law cannot attack receiver's status, nor that of the judgment by which he was appointed, by showing that the court wherein judgment creditor had obtained judgment as a preliminary to the action for a receivership did not have jurisdiction to render judgment." Collins *vs.* Burr, 204 N. Y. S., 357.

Intervention is the application of a person not a party to the suit to litigate some claim of title or interest, by way of lien or otherwise, in the property which is the subject-matter of the suit, or which has been drawn into the possession of the court during the progress of the cause. 223 U. S., 330; 266 Fed., 832.

Intervention is not independent, but ancilliary to the suit. 156 U. S., 47; 15 Sup. Ct. Rep., 266; 275 Fed., 1017.

Menzi, Bordman, and the Bank of the Philippine Islands are entire strangers, and their sole and exclusive object is to destroy a judgment of the courts of the Philippine Islands, and their sole alleged and avowed object is to attack the jurisdiction of the court.

The general rule is that a stranger cannot make himself a defendant in a suit in equity, and courts of equity have adhered to this rule as a basis in determining whether the application to intervene should be granted. 74 Fed., 326; 144 U. S., 519; 4 Fed., 488.

In 67 Fed., 170, the court says: "That a stranger to a suit will not be permitted on his own application to be made a party defendant in an equity suit over the objections of plaintiff is a well-established general rule to which there are few exceptions." (And the reasons are fairly stated in Greagory *vs.* Pike, 15 C. C. A., 33; 67 Fed., 845; Chester *vs.* Life Asso. of America, 4 Fed., 491.)

The rule thirty-seven (37) of Rules of Practice for the Courts of Equity of the United States, in its last paragraph lays down the law in the Courts of the United States and is as follows:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by

intervention, but the intervention shall be in such ordination to, and in recognition of, the propriety of the main proceedings."

While this rule permits any one having an interest or claiming an interest at any time, yet it is required to be in subordination to the main proceedings. King *vs.* Barr, 262 Fed., 56; Jennings *vs.* Smith, 242 Fed., 564; Cauffield *vs.* Laurence, 256 Fed., 714.

The mere fact that a party ASSERTS some interest in the controversy or in the property does not bind the Court to permit the intervention, even though the property is in the hands of a receiver. Minot *vs.* Martin, 37 C. C. A., 234; 95 Fed., 739.

A petition must be filed asking for permission to intervene where there is a right to intervene. Blaffer *vs.* New Orleans Water Supply Co., 87 C. C. A., 341; 160 Fed., 392; Perry *vs.* Godbe, 82 Fed., 143; Born *vs.* Schneider, 128 Fed., 179.

In order that there may be no misunderstanding in regard as to what law governs and what decisions bind the courts of first instance in the Philippine Islands, and the Supreme Court of the Philippine Islands, the following authorities are submitted:

"The State Supreme Court must bow to the authority of the United States Supreme Court in deciding Federal questions." Howard *vs.* Davis, 95 Southern, 354.

"The State Supreme Court is bound by the decisions of the Supreme Court of the United States on the question of whether a case was made for removal of a cause from a State to a Federal Court." Missouri Pac. R. Co. *vs.* Tompkins, 247 S. W., 54.

In giving his instructions to the Commission, President McKinley stated in said instructions:

> "At the same time the Commission should bear in mind, and the people of the Islands should be made plainly to understand that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their Islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar."

The petition to intervene should be accompanied with the pleading sought to be filed in the event the intervention is granted, and both the petition to intervene and the pleading to be filed after intervention is permitted must show:

First. That there will be no delay to the parties in the prosecution of the main suit;

Second. That the pleading is reasonably sufficient to effect the purpose intended and has been drawn up as provided by the statute;

Third. That it is a proper case for intervention.

> Toler *vs.* East Tennessee, V. & G. R. Co., 67 Fed., 174-5.

> Any of the parties to the suit may contest the application, and they have the right to have all the grounds upon which the application is based to be specifically set forth. Powell *vs.* Liecester Mills, 92 Fed., 115-16.

The court has no jurisdiction to allow intervention for the purpose of attacking the jurisdiction of the court. The petition requesting permission to intervene, as well as the motion made after intervention in that case, were both made for the exclusive purpose of attacking the jurisdiction of the court.

Once jurisdiction has attached the parties seeking to intervene will be excluded from questioning the jurisdiction of the court. According to the rule of the courts of equity of the United States, as well as the statute in force in the Philippine Islands, intervention is allowed only to those who have a real interest in the controversy then before the court, and their intervention must be in recognition of and in subordination of the main case. In other words, they must accept the jurisdiction of the court before they can be heard. It is an absurdity to request the court to take jurisdiction to be heard on a question that it has no jurisdiction.

The parties seeking to intervene must have a legal interest which will be affected by the decree of the court. And the decree referred to in this case is the decree rendering judgment to A. N. Jouredini & Brothers and against Behn, Meyer & Company, Ltd. 256 Fed., 238; 242 Fed., 564; 275 Fed., 1017.

Nor can intervention affect jurisdiction once obtained. 116 Fed., 534. The interveners cannot even attack the jurisdiction although asserted by cross-bill against other defendants from same state. 117 Fed., 89; Morton Trust Co. *vs.* N. Y. & O. R. Co., 105 Fed., 539; Rice *vs.* Durham Water Co., 91 Fed., 434; Sioux City Ter. R. & W. Co. *vs.* Trust Co., 82 Fed., 128; 27 C. C. A., 73.

"Interveners must take the case as they find it. If their interests suffer it is their own act, nor can they object to the jurisdiction of the court." Kumer's Sindic *vs.* Holliday, 19 La. Ann., 154; Smith *vs.* Gale, 144 U. S., 509; 12 Sup. Ct., 674.

"Persons voluntarily appearing in an action to file a petition of intervention are estopped to say that the court did not have jurisdiction of them." Jack *vs.* Des Moines & Ft. D. R. Co., 49 Iowa, 627.

The jurisdiction of the court in that case had already attached many years previously and had been decided both by the Court of First Instance and the Supreme Court of the Philippine Islands. Not only had the case been before the courts for years, but the very judge who tried the main case in January, 1922, and who had issued the execution in April, was the very judge who made the appointment of the receiver.

"A decision on a demurrer is the law of the case until a different rule is laid down by the Supreme Court, although such decision was rendered by another judge than the one trying the case finally." 156 U. S., 680.

The petition asking permission to intervene is signed by Crossfield & O'Brien, as attorneys for J. M. Menzi and John Bordman. The record of the case, the very decision rendered by Judge Harvey in January, 1922, shows that the attorneys Crossfield & O'Brien, the then attorneys for the firm of Behn, Meyer & Company, Ltd., and that J. M. Menzi, the manager-director of the said Corporation, were the very person and attorneys who had originally filed the case in the Court of First Instance, the very firm and persons who

had won the case and had fought the appeal by the judgment creditor, A. N. Joureidini & Bros., before the Supreme Court in 1919, and the very persons who had fought the claim of Jouredini & Bros. in the Court of First Instance in 1922.

Yet despite these facts, which the record speaks on its face, and which was called to the attention of the lower court, the temporary and auxiliary judge of the lower court waves aside this palpable reversal of form and allows them to intervene. This in the face of the decisions of the Courts of the United States and the Philippine Islands to the contrary.

> "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis *vs.* Wakelee Sup. Ct. Reptr. Vol. 15, p. 556.
>
> "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment claim that it was without personal service upon him." Davis *vs.* Wakelee, 15 Sup. Ct. Rep., 556.

The petition to intervene recites that the reason for attacking the jurisdiction of the Court by the interveners was the alleged fact that the Alien Property Custodian had sold the business of the plaintiff in 1919, and that the Alien Property Custodian had seized the business in 1918. Yet

in 1922, six months before the receiver was appointed, we find Menzi and Crossfield & O'Brien in the Court of First Instance of Manila, in this very case of Behn, Meyer *vs.* Stanley et al., then representing Behn, Meyer & Co., Ltd., insisting on the jurisdiction of the court, and insisting that the money claimed by the judgment creditor A. N. Jouredini & Bros. was not owing to them. If the petition stated facts and the law correctly then the interveners were guilty of deceiving the court in January, 1922, six months before the appointment of the receiver. They were silent because they knew, as did their attorneys, that the statements made in the motion to set aside the order of August 10, 1922, appointing the Receiver, are utterly without foundation in fact, and that the said motion was made for the sole purpose of deceiving the court and keeping out of the hands of the Receiver the books of the firm of Behn, Meyer & Company, Ltd., which books will show the particular acts of the three interveners in the fraud practiced on the plaintiff corporation and on the government of the United States. They were afraid of the entries in the books. They were all three facing criminal prosecution and they and their lawyers knew it. They were willing to do anything to stop the threatened exposure.

The record further discloses that on July 24, 1918, in another case in the same court, presided over by the Hon. Judge Geo. R. Harvey, the intervener, Menzi, through his attorney, A. S. Crossfield, received from the Court of First Instance a certificate of deposit belonging to and the property of Behn, Meyer & Company, Ltd., for the face value of two hundred thousand pesos ($100,000.00) and signed as the "Attorney for the Alien Property Custodian."

The record further discloses that after the receiver had been appointed the aforesaid Crossfield & O'Brien voluntarily came into the Court of First Instance, then presided over by the said Hon. Geo. R. Harvey, and submitting to the jurisdiction of the court, filed a claim against the receiver of Behn, Meyer & Company, Ltd., for thousands of dollars, certified by the said Crossfield under oath to be due to him from the firm of Behn, Meyer & Company, Ltd., and that the said Court of First Instance heard and allowed the said claim of the said Crossfield & O'Brien and ordered the receiver to pay the same when funds were available.

It is in particular to be noted that counsel for the plaintiffs in this case rely particularly upon the fact that the same court which appointed Joseph receiver removed him for the reason that at the time of appointing him it was not fully advised of the facts in the case. It should be remarked in this regard that the same court which appointed him did not remove him. He was appointed by Regular Judge Harvey. He was removed by Substitute Judge Diaz. It is true that Diaz, in his opinion removing him, states that certain facts concerning the seizure and sale of Behn, Meyer were not called to the attention of the court, but this statement is so far from the truth as to be little short of ridiculous. Judge Harvey had twice tried the case; he had before him Menzi's statement to the sheriff on the return of execution that all the property of Behn, Meyer had been seized by the Alien Property Custodian; he knew there was no tangible property within the jurisdiction. Nothing was presented to Judge Diaz which Judge Harvey had not previously considered.

Judge Diaz's opinion proceeds solely upon the ground that

there was no property of Behn, Meyer & Company which the receiver could administer. This, as above shown, is not the fact. But were it the fact, the proceeding of Judge Diaz in removing this receiver remains irregular and illegal for the reasons set out above.

(3) *The Receiver Has Stayed the Force and Effect of the Order of Judge Diaz, and Therefore is Still Receiver.*

Finally it is to be noted that in this case Joseph appealed from the order removing him as receiver, a bill of exceptions being perfected, and the case is now before the Supreme Court of the Philippine Islands. Counsel for the plaintiffs in this case at page 16 attack the contention of the intervener that the perfecting of the appeal operates as a supersedeas and continues the receiver in office.

Counsel for the plaintiff supports his position by citing Watson *vs.* Enricas, 1 P. R., 480, in which he says: "A similar contention was overruled." This statement is an error for the reason that Watson *vs.* Enricas did not concern a receivership at all, but a preliminary injunction. As set forth in the answer, that case was argued on the supposition that Section 144 of the Philippine Code, which provides that the filing of a bill of exceptions would stay execution, would be sufficient authority for the contention to the filing of a bill of exceptions would stay the dissolution of a preliminary injunction. The Philippine Code does not provide whether or not an appeal from the vacating of a receivership operates as a supersedeas; but it is submitted that the case of a receivership is far more analogous to the situation arising after judgment and before execution than such later situa-

tion is with the dissolution of a preliminary injunction. A preliminary injunction is an extraordinary remedy resting upon irreparable damage. When a preliminary injunction is granted, an entirely different situation results from that which arises when a receiver is appointed. The status quo is preserved by the granting of a preliminary injunction. The status quo is not preserved, but in fact, is altered by the appointment of a receiver. This deals with the basic consideration governing this question, that is to say, the maintaining of a status quo. The reason for a supersedeas in any event is that the status quo be preserved. After the appointment of a receiver, that official takes action in various ways. There is a certain status which obtained at the moment his receivership is vacated. It is that status which is to be preserved and not a status which obtained at the commencement of the litigation, which later status is the status sought to be preserved by a preliminary injunction. Compare this with an execution. After the rendition of judgment a certain status arises, namely, one party is liable for a sum of money which he has in his possession. The granting of supersedeas is to leave this money in his possession and to maintain the status which existed at the time of the rendition of the judgment.

> "A supersedeas or stay on appeal from an order appointing or discharging a receiver does not prevent the court from taking such proceedings and making such incidental orders as may be necessary for the preservation of the property or assets and the protection of the rights of the parties pending the appeal."

This not only recognizes that supersedeas can be had on an appeal from an order dismissing a receiver, but it also indi-

cates the basic reason why such supersedeas should operate to maintain the receiver in office. The rights of the parties clearly require that the receiver continue in existence long enough to dispose of the matters which may have come into his hands as receiver or chose in action are fully enforced. In this connection it is to be noticed that neither the dismissal of a bill and the taking of a supersedeas together can relieve a receiver from the duty to act. (See Hitz *vs.* Jenks, 16 D. C. Appeals, 530.)

It is submitted that the rule is clearly laid down in 3 C. J., 1326, where it says:

> "But, as a rule, the supersedeas does not vacate the receiver or discharge the receiver."

This supersedeas, of course, is a supersedeas effective on appeal from an order appointing a receiver. But the converse of that proposition should be equally true. The receiver should continue in existence whether that existence is attacked by order of the court or supersedeas by the parties until such time as the Court of Appeals shall have determined the question and the matter is finally determined.

Counsel for the plaintiff, in Sections 19 and 20, pages 13 and 14 of the answer, sets up the fact that in a suit brought by Joseph, as receiver, against the Hamburg American line, the Supreme Court of the Philippine Islands has decided that he is not the receiver of Behn, Meyer & Company. The facts attending the prosecution and decision of this suit are not before this court. Concerning the decision in this case, there is nothing but a telegram from the clerk of the Supreme Court of the Philippine Islands. For all that appears, the question as to whether Joseph was receiver of Behn, Meyer & Company, was a purely collateral matter in this action. This

case was commenced early in 1923, and there was no reason why the pleadings in the case against the Hamburg American line should set up the illegal transfer of the properties of Behn, Meyer & Company. There is nothing to show that such facts were ever before the Court of First Instance or the Court of Appeals in the case of Behn, Meyer & Company *vs.* Hamburg American. Indeed, the probabilities are the other way. As early as May, 1923, the attorneys for defendant, the Hamburg American line, demurred to the complaint filed by Joseph, as receiver, and the demurrer was held against them and on it they appealed. Furthermore, the telegram of the clerk of the Supreme Court of the Philippine Islands says that that court held that Joseph was not the receiver for the reason that the properties of Behn, Meyer had been sold to Bordman. If this is the reason given by the Court of Appeals, it is obvious that the court could not have decided that question upon its merits, for the reason that there was nothing in the case of Behn, Meyer & Company *vs.* The Hamburg American to bring before the court the question of the transactions between Menzi, Bordman, and the Bank of the Philippine Islands. The court never looked into those transactions, but, for all that appears, accepted an allegation that the properties were sold and based its decision upon that. The appeal on the direct question of the receivership is now before the Supreme Court of the Philippine Islands and has not been yet determined. This the answer of counsel for the plaintiffs itself recognizes on page 15.

(*b*) The Receiver is Not Guilty of Laches.

Counsel for the plaintiff in this case, on pages 26 *et seq.*, alleges that the receiver has been guilty of laches. In this

regard, and in particular answering the allegations in paragraph 41 on page 26 of the said answer, it is to be noted that while it is true that Lazarus G. Joseph was appointed receiver on August 10, 1922, it was not until a year later that he had accumulated sufficient facts to warrant a filing of a suit against Menzi, Bordman, and the Bank of the Philippine Islands alleging their fraud and theft in connection with the properties of Behn, Meyer. After a year, in which he finally endeavors to obtain some information as to the whereabouts of the properties of the company for which he was receiver, he makes application to Menzi for the books of the company. This is refused him. He then files a suit against Menzi on August 31, 1923. It was then, and not until then, that his receivership was attacked. It was not until he began to bring home to Menzi and Bordman and the Bank of the Philippine Islands their illegal disposal of the company's proceeds that these persons began their attempt to silence him by removing him as receiver. The simultaneousness of these two actions—that is to say, the demand for the books by Joseph and the attack upon Joseph, receiver, by the custodian of the books—is in itself highly significant. It was during this year that the suit of Behn, Meyer & Company *vs.* Miller *et al.* was commenced. That suit was decided and appealed before August 1, 1923, when the receiver made his demand upon Menzi for the books and was finally brought face to face with the fraud and deceit which he had to cite. He had no knowledge during that year of events which were transpiring six thousand miles from him in Washington. The attempt, on page 27 of the answer, to raise the implication that Mr. Henry D. Green, who had formerly been the attorney for Behn, Meyer & Company and who at that time

was in the office of the Alien Property Custodian in Washington, communicated his knowledge, if he had any, of the suit brought in Washington to the receiver in the Philippine Islands, is both unfounded and unwarranted, and further displays the fundamental weakness of the position attempted here to be taken by counsel for the plaintiffs. In his capacity as an official of the Alien Property Custodian, Mr. Green could not act for or on behalf of Behn, Meyer & Company or its receiver. And it is submitted that if counsel for the plaintiff means that the receiver was in fact informed by Mr. Green of this suit, it is submitted that he should say so definitely and not seek the subterfuge of suggestion.

It is submitted that the matters set forth in paragraphs 42, 43, 44, on pages 27 and 28 of said motion are irrelevant, immaterial, and impertinent, and are furthermore an unwarranted attempt to cast reflection upon certain attorneys whose names are not mentioned by allegations of matters which in no way affect the question as to whether or not this receiver is guilty of laches. Supposing it were true that "for the purpose of securing funds to pay themselves" some of the attorneys for the receiver filed a claim with the Alien Property Custodian under paragraph 10 of subsection B of section 9 of the Trading with the Enemy Act. Does that in any way indicate that the receiver had any knowledge of the suit of Behn, Meyer *vs.* Miller *et al*? It is submitted that in this connection counsel for the plaintiff is alleging only half the truth. If he were intent upon setting forth the whole of this matter to the court, he should continue and state that the application for the $10,000.00 was withdrawn by the attorneys for the receiver and was not thereafter pressed in any way, shape, or form.

But counsel for the plaintiff, in paragraph 44 of his answer, himself discloses when this matter was brought to the attention of the receiver where he says:

> "In January, 1924, the said receiver's attorneys discovered that they could not secure the payment of $10,000.00 out of the funds of Behn, Meyer & Company, Ltd., in the hands of the Alien Property Custodian, because the company itself had theretofore and in 1922 sued to recover the funds so held and the said suit was still pending."

It may be noted in passing how counsel for the plaintiffs again attempts to insinuate in that sentence that the claim for $10,000.00 was still being pressed and had not been withdrawn; but that is not the important part of that sentence in this regard. The important part is that it was not until January, 1924, that anybody officially representing the receiver was made aware of the existence of this suit. Attempt was at once made to obtain from the Philippine Islands the necessary certified copy of papers to support an application for an intervention. These papers were prepared and returned to this country as expeditiously as possible, and, being received here in the latter part of September, a motion to intervene was drawn up and filed as promptly as possible.

It is to be remembered at the same time that between the dates of September 26, 1923, and May 28, 1924, the receiver, Joseph, was not in a position to intervene. He was removed on September 26; the bill of exceptions was not completed and filed before May 28, 1924. Furthermore, during this period of time the case of Behn, Meyer *vs.* Miller *et al.* was pending in the court.

To sum up, it appears that the case of Behn, Myer *vs.* Miller was argued in the Court of First Instance, appealed and argued in the Court of Appeals before the receiver had been made aware of it or before he had succeeded in bringing home satisfactorily to himself the illegality and wrongdoing of Menzi, Bordman, and the Bank of the Philippine Islands; before, therefore, he had satisfied himself that he was in possession of evidence justifying him to take action for the recovery of the properties which those parties had stolen, and to recover the funds which they had wrongfully paid over to the Alien Property Custodian. No sooner had he given evidence that he was in that position than the parties in question to save themselves from that attack, attacked him in turn. It was not until May of this year that he was in a position to intervene in this court and he has now intervened in approximately one year from the date when he first was subjected to attacks in his receivership.

(*c*) This Suit is Not Brought by Persons Properly Representing Behn, Meyer & Company, Ltd.

Counsel for the plaintiff in this suit, in paragraph 29 *et seq.*, on page 20 *et seq.* of his answer, endeavors to set up the fact that this suit is properly being maintained by Behn, Meyer & Co., Ltd. This contention has already been denied by the intervener.

In order to substantiate his position, counsel for the plaintiff is compelled first of all to rest his arguments upon the fact that Behn, Meyer & Company was not seized by the British Public Trustee. To this end he quotes a letter from the comptroller of the local clearing-house at Singapore as follows:

> "Under emergency local legislation only the business of Behn, Meyer & Company in the colony was wound up and not Behn, Meyer & Company, Ltd., as a whole."

This letter, far from substantiating counsel's position, effectively refutes it. Behn, Meyer & Company of Singapore was Behn, Meyer & Company as a whole. The letter says that that company was wound up. It is submitted that this means that the existence of the company was terminated according to the procedure known in English law as "winding up" and laid down and regulated by the Companies Act (Consolidated) of 1906. The procedure is one involving the realization of all assets in money, the payment of outstanding liabilities, and the payment of the balance to the shareholders and others entitled. This was the process applied to Behn, Meyer & Co., Ltd., of Singapore, and when concluded all that remained to the stockholders was the right to demand from the liquidator their proportionate part of the balance remaining. The British Public Trustee undertook to wind up the company. He seized all of it that he could seize—that is to say, the company at Singapore. He did not wind up the whole of the business of the company for the reason, as the letter above quoted says:

> "Moreover, it was not possible to wind up the business of the branches of the firm in foreign countries as local law had no jurisdiction over them."

His authority to do so appears from the following:

Amendment to the Trading with the Enemy Act, 1916.

SECTION I (1). Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm or company is by reason of enemy nationality or enemy association of that person, firm or company, or of the members of that firm or company or any of them, or otherwise, carried on wholly or mainly for the benefit of enemy subjects, or under the control of enemy subjects, the Board of Trade shall make an order either:

(*a*) prohibiting the person, firm or company from carrying on business.

(*b*) requiring the business to be wound up.

SECTION I (3). The distribution of any sums or other property resulting from the realization of any assets of the business, whether those assets are realized as the result of an order requiring the same rules as * * * *provided*, that any sums or other property which had a state of war not existed would have been payable or transferable to enemies shall be paid and transfered to the custodian under the Trading with the Enemy Act to be dealt with by him in like manner as money to him paid under that Act.

NOTE.—The Trading with the Enemy Act, section 5, provides for the holding of enemy money paid to the custodian.

Counsel for the plaintiff, following the above quotation, has the temerity to make this statement:

"The British authorities have not assumed control of the corporation or superseded its directors and officers in any way or put in any new directors or officers."

When the business of the company was wound up there was nothing over which the British authorities could assume control. They did not supersede the directors and officers of the company for the reason that the directors and officers no longer existed. The stockholdings of every member of that Company were seized, and there remained nothing but the franchise originally granted to the men who formed the company by the British government. This franchise was taken back by the British and may or may not now be in existence. If it is in existence it is held by the British Public Trustee.

After Behn, Meyer & Company, of Singapore, was seized by the British Public Trustee and its business wound up there remained nobody corporate which could function. The script upon which the shares were written may have remained in the possession of the individual stockholders, but they were worthless pieces of paper. The interests represented by them had long ago ceased to exist. It is, therefore, palpably absurd upon the face of it to allege as is alleged in the answer that certain stockholders of Behn, Meyer & Company, Ltd., did any act which could in any possible way be construed as the act of the corporation. The answer itself sets out that Lorenz Mayer, Laspe and Witthoefft had purchased all the stock of the company by December, 1921. But the answer equally says that the transfer of the stock to them took place after the seizure of the Philippine branch by the Alien Property Custodian, and, therefore, after the British Public Trustee had seized the parent company at Singapore. These persons were alien enemies of Great Britain; it is so alleged by the motion papers of the inter-

vener and is not denied by the answer. Therefore by the law of England their transfer was wholly void:

British Trading with the Enemy Act, 1914.

> SECTION (8). No transfer made after the passing of this act by or on behalf of an enemy of any security shall confer any rights or remedies in respect thereof * * * and no company shall take any cognizance of or otherwise act upon any notice of such a transfer.

If these three persons bought anything, therefore, they bought nothing but worthless script. However, as above stated, these three named persons were German nationals and residents of Germany. They, therefore, had no interest whatsoever in Behn, Meyer & Company after the British Public Trustee had seized it. They were enemy aliens and the British law looking behind the corporation would have discovered and did discover their enemy character and their holdings were instantaneously forfeited under the British Trading with the Enemy Act. Their holdings once gone, they could not recover them, and, therefore, even supposing that all the other stockholders of Behn, Meyer & Company were not enemy aliens of Great Britain, still it would have been impossible for these three named men to buy all the stock of Behn, Meyer & Company for the reasons that they would never buy back their own which had been seized.

The answer of plaintiff to this motion, however, alleges that these three persons did in fact buy and become possessed of all the stock of Behn, Meyer & Company, Ltd. If this is true, then the allegations of the original bill of complaint are

not true. If this is true, then all the stock of Behn, Meyer & Co., Ltd., was enemy owned. But the bill, in paragraph VIII, alleges:

> "* * * by the plaintiff, a subject of the British Empire, the minority of whose stock was not owned, held, or possessed by any citizen, subject, or resident of any enemy nation or any ally thereof. * * *"

The purpose of the allegation in the answer that all the stock was owned by these three persons was, of course, to leave no doubt but that all the stock of the company was present at the extraordinary general meeting of shareholders, which the answer next proceeds to set up.

Counsel for the plaintiff, in Sections 31-40, on page 21 *et seq.*, of the said answer, sets out in detail the actions taken by these three men representing themselves to be Behn, Meyer & Company for the purpose of giving a valid power of attorney to Emil W. Martens by virtue of which he might bring this suit. Counsel for the plaintiff obviously does so because he must substantiate the validity of Martens' power of attorney, in order to show that this suit was rightfully brought by Behn, Meyer & Company. But at the very outset of his allegations in Section 31 it is to be noted that he alleges that an extraordinary general meeting of shareholders of Behn, Meyer & Company was held, but he does not allege the necessary facts to prove that this meeting was lawful and a legal meeting.

It is submitted that such facts are not alleged because they did not exist, because this meeting was not a legal valid meeting. This company was incorporated at Singapore, Straits Settlements. It is therefore governed by the Companies Ordi-

nance of the Straits Settlements, enacted March 28, 1889. This ordinance provides as follows:

SCHEDULE THE FIRST, ATTACHED TO SAID ORDINANCE AND A PART OF IT.

TABLE (A)

Regulations for the Management of a Company Limited by Shares.

(32) The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one-fifth of the number of the members of the company, convene an extraordinary general meeting.

(33) Any requisition made by the members shall express the object of the meeting proposed to be called and shall be left at the registered office of the company.

(34) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitioners or any other members amounting to the required number may themselves convene an extraordinary general meeting.

(58 and 59) Provide for the retiring of the directors, third of their number each year.

The company had had no meetings since 1914. Therefore, by Sections 58 and 59, *supra*, by 1921 there could be no directors left in office for all had been automatically retired by law. Under such circumstances by sections 33 and 34, *supra*, a requisition for a general meeting should have been made at the registered office of the company at Singapore. This

was not done nor was this meeting held at Singapore. It appears that it was held on December 13, 1921; that the meeting of directors which followed it was held December 13, 1921; that the meeting of the consulting committee which followed the meeting of directors was held December 13, 1921; and that the power of attorney given to Emil W. Martens pursuant to authority granted in these three meetings was given to him on December 14, 1921. The attestation before the notary public to this power of attorney is dated December 14, 1921, in the city of Hamburg, in Germany. It is submitted that this meeting of stockholders was not merely illegal for the reason that there were no stockholders present at it, but that it was not held in the manner in which such meetings were under the law governing this corporation to be held.

It is further submitted that the illegality and invalidity of the power of attorney sufficiently appear from the answer of the plaintiffs itself, and that therefore the act of Emil W. Martens in bringing this suit is not the act of Behn, Meyer & Company, Ltd. The power of attorney does not bear the seal of the corporation. The Companies Ordinance above referred to prescribes as follows:

> *Article 43.* Upon the registration of the memorandum of association and the articles of association in cases where articles of association are required by this ordinance * * * the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum of association, capable forthwith of all the functions of an incorporated company and having perpetual existence and a common seal.

Article 70. Contracts on behalf of any company under this ordinance may be made as follows (that is to say):

(*a*) Any contract which if made between private persons would be by law required to be in writing and if made in accordance to English law to be under seal may be made in writing under the common seal of the company.

Article 84. Any company under this ordinance may by instrument in writing under its common seal empower any person either generally or in respect to any specific matters as its attorney to execute deeds on its behalf in any place not situated in the colony; and every deed signed by such attorney on behalf of the company and under his seal shall be binding on the company as if it were under the common seal of the company.

Article 69. * * * and shall have its name engraved in legible characters in such language (English) on its seal.

It is submitted that as a matter of law no power of attorney which seeks to give such wide power to an agent to execute any and all kinds of papers would be valid without it was under seal. The law clearly intended that where the agent was to execute papers under seal, there his power from the Corporation must be under seal. But even if the technicalities of the seal might not vitiate an act otherwise valid, is it reasonable to suppose that a corporation would attempt to what is here done without sealing the instrument? Where the law so specifically requires the company to have a seal, is it credible that the company would attempt to make so important an instrument as this power of attorney without using it?

Were it, however, true that this suit in fact is being brought by the corporation of Behn, Meyer & Co., Ltd., that fact would not entitle the company to receive from the Government the moneys paid over to the Alien Property Custodian, which are the subject-matter of this suit. It is to be remembered that these moneys represent the assets of Behn, Meyer & Company in the Philippine Islands. These assets were within the jurisdiction of the courts of the Philippine Islands, and at this point it must be considered what was the effect of the admission of Behn, Meyer & Company to do business in the Philippine Islands under the original license of 1907. By making application to be admitted to do business in the Philippine Islands and by accepting the license above referred to from the Philippine authorities, Behn, Meyer & Company, Ltd., became liable, to the extent of their business in the Philippine Islands, of all the laws which governed domestic corporations within those Islands. Its business became amenable to the courts of the Philippine Islands, which acquired the power to enforce against the business in the Philippine Islands all claims and demands such as they enforce against the assets of domestic corporations of the Islands. It was not merely a physical but a legal fact that the assets of Behn, Meyer & Company which constituted the Philippine Islands business were under the jurisdiction and control of the courts of the Philippine Islands. The money here sought to be recovered is money resulting from assets in the Philippine Islands. It is, therefore, money over which the courts of the Philippine Islands have jurisdiction and control. As between the receiver appointed by the courts of the Philippine Islands to take charge of the business there and the Company itself, it can hardly be questioned but that the receiver will take precedence in the re-

covery of such money wherever it may be found. This money is a fund out of which the creditors of the Philippine Islands business are to be paid. The determination of the question of what the receiver shall do with any balance remaining in his hands after the payment of the creditors is a matter with which this controversy is not concerned. To pay this money over directly to the corporation is to render without force or effect the laws of the Philippine Islands, which made the business of this corporation in the Philippine Islands subject to all the laws of those Islands. Such a provision was clearly made for the protection of creditors in the Philippine Islands. To return this money to any other place than the Philippine Islands is to render the protection, afforded by the laws of the Philippine Islands to creditors, nugatory and ineffective.

(*d*) This Intervention is Necessary to do Justice in the Premises.

Counsel for the plaintiff in paragraph 24 on page 19 of the answer sets up that even supposing the interveners should be properly appointed receiver of Behn, Meyer & Company, Ltd., of the Philippine Islands, nevertheless, he is not entitled to intervene because he would have no standing before the courts of this jurisdiction to sue for the funds in question in this suit. Counsel for the plaintiff cites Sterret *vs.* The Second National Bank, 248 U. S., 73, in support of his contention. It is submitted that Sterret *vs.* The Second National Bank is no authority whatsoever to support it. In Sterret *vs.* The Second National Bank the plaintiff, receiver of a corporation in one jurisdiction, endeavored to

bring suit in another jurisdiction, and it was held, according to the well-known rule, that he could not do so. Of course, in such a case ancillary receivership proceedings are necessary in the jurisdiction in which the suit is to be brought if that jurisdiction is not the jurisdiction appointing the receiver.

It is, however, submitted that the receiver in this case would not be precluded from suing in this jurisdiction. Since the decision in Sterrett *vs.* Second National Bank, Congress passed the Act of June 5, 1920, amending Section 9 of the Trading with the Enemy Act, in which amendment it is provided:

> "Any person not an enemy or an ally of an enemy claiming any interest in any money, etc., which may have been conveyed, etc., to the Alien Property Custodian or seized by him * * * such claimant may * * * institute a suit in equity in the Supreme Court of the District of Columbia * * *."

The receiver, therefore, would have the statutory right to sue in the District of Columbia, though not the jurisdiction in which he was appointed.

In this present case, however, the receiver is not attempting to bring an action. He is asking to be allowed to intervene in an action already brought. It is submitted that it is now settled law that a party may intervene in a court in which he would have no standing to bring a suit in his own behalf. This was specifically the holding in Marye *vs.* Diggs, 98 Va., 749. In that case the Supreme Court of the State of Virginia upheld the right of the State to intervene in a proceeding between a county and a taxpayer in a court in which the State would have no jurisdiction to sue the

taxpayer, and in so holding cited Stuart *vs.* Dunham, 115 U. S., 61.

In Stuart *vs.* Dunham the Supreme Court held that where a cause had been removed to the Federal court parties might properly intervene in the Federal court, although they might not have been entitled to maintain an action in the Federal court against the defendant.

Counsel for the intervener wishes to call the attention of the court to the following language in the decision in Stuart *vs.* Dunham:

> "The right of the court to proceed to decree between the appellants and the new parties would not depend upon different citizenship; because the bill having been filed by the original complainant on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court in exercising jurisdiction between the parties could instantly decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancilliary to the jurisdiction acquired between the original parties and it would merely be a matter of form whether new parties should come in is co-complainant, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree."

From the above language it might be inferred that the decision of the Supreme Court in this case was somewhat affected by the fact that the bill was filed on behalf of the original complainant and all other credtiors who might come in under it. However, it is submitted that since consent of parties cannot give jurisdiction to a court, it would seem that the filing of such a bill would not of itself confer upon the

court jurisdiction to consider the claims of creditors, which otherwise it would not be entitled to consider. Again courts will not litigate in favor of parties not before them. And therefore, very obviously there must be some way of bringing parties before the court who in justice ought to be there even though they might not be able to come before that court in their own right alone.

This latter thought indicates the basic reason upon which this intervention is sought. As above set forth, the intervener, Lazarus G. Joseph, the receiver of Behn, Meyer & Company in the Philippine Islands, has a duty to perform which is to collect the assets of the Philippine branch wherever he is able to find them. The long and involved sequence of facts in this case finally discloses that part of the assets are not merely in the city of Washington, but are there being litigated over by certain parties who seek to obtain them. It further appears that the bill filed by these parties does not bring before the court the true and accurate state of facts obtaining with regard to these assets. It is equally true that this intervener was not able to intervene at any prior stage of this proceeding either to protect his own rights or to inform the court of a truth concerning the matters in litigation. If hereafter this cause is remanded to the Supreme Court of the District the receiver can intervene in the usual way. But at this present time and in this present emergency there is no other course open to him than to appear herein as an intervener, lay before the court the true state of facts and request the court to take such action as justice and equity demands.

In this connection it is to be remembered that Federal equity rule No. 37 provides that intervention may be at any

time; and it is submitted that, while the general rule is that intervention is not permitted at a final decree, nevertheless when taken in conjunction with the rule that a party has an absolute right to intervene when if he does not do so his rights will be lost to him, equity rule 37 may properly be interpreted as allowing this intervener to intervene at this stage of the proceedings.

III.

The Plaintiff's Answer Herein is Inconsistent With Its Former Pleadings and Sets up New Irrelevant and Immaterial Matter.

It is submitted that when the original bill filed by the plaintiffs in this case and the answer to the motion of intervention filed by them are read together it is at once apparent that:

(1) The two are inconsistent, because in the bill of complaint the seizure of Behn, Meyer & Company is alleged to be illegal and unlawful, while in the answer, the said seizure is described as being conducted regularly, legally and lawfully by the Alien Property Custodian.

(2) The allegations of the bill is to the effect that part of the stock was not enemy owned; if the facts alleged in the answer are true the entire stock was enemy owned.

(3) The bill is silent as to any seizure by the British Public Trustee of Behn, Meyer; the answer claims that Behn, Meyer was not seized; but in the answer it appears that the British authorities "wound up" Behn, Meyer at Singapore, and alleges no facts

to explain why the winding up of Behn, Meyer at Singapore was not a complete seizure of the corporation since its home office was in Singapore and it was incorporated there.

(4) That the answer alleges an extraordinary stockholders' meeting, but does not allege facts which would show that this meeting was regularly and properly held.

Considering the allegations of the answer seriatim we find as follows:

(1) Paragraph III alleges that Harrison seized Behn, Meyer on behalf of the Custodian.

(2) Paragraph VI alleges that Moffat concluded the liquidation begun by Harrison.

(3) Paragraph VII alleges that the custodian authorized and approved what was done with regard to Behn, Meyer.

From the above it would seem that the seizure of Behn, Meyer is justified as an orderly, regular and legal procedure, but if such is the force of the allegations in the answer how can they be reconciled with the allegations of the complaint:

Paragraph VIII of the bill:

"The said conveyance, transfer, assignment, delivery, and payment thereof to the Alien Property Custodian were illegal, wrongful and void."

(4) Paragraph V of the answer sets up that there was a demand made on Behn, Meyer and under the demand Behn, Meyer was determined to be an enemy; quoting letter from Custodian to that effect.

The force of this allegation must be that there was an illegal determination of enemy status and proper demand so that the money paid under it was properly paid. But if this is so how is such allegation to be reconciled with the bill:

Paragraph VIII of the bill:

"That no due or legal determination was ever made under said Trading with the Enemy Act that the plaintiff was an enemy or an ally of an enemy; that no due and lawful demand for said property and assets as required by law was ever made or served upon the plaintiff."

In paragraph X of the answer the allegation is made that three years before Joseph was appointed receiver there was no longer property of Behn, Meyer in the Philippine Islands and no right for it to do business there, because the same was destroyed by the Alien Property Custodian.

That would be the result if the seizure had been rightful if there had been a due and lawful demand made; but how can such allegation be correct if the allegations of the bill of complaint are correct that the whole proceeding was void from start to finish.

In paragraph XIV of the answer, it is alleged that Jureidini & Bros. in 1922 could not comply with the provisions of Section 9-*e* of the Trading with the Enemy Act, because the date did not arise in reference to money held by the Custodian.

The answer omits to point out that Jouredini could have complied with that section because if the property was wrongfully sold a trust was impressed upon its purchase price and the same can be followed.

In paragraph XV, attempt is made to justify the removal of Joseph as receiver, but allegations concerning the actions of a court in Manila.

> XV. "It should be pointed out here as the Court of First Instance of Manila itself subsequently did in its opinion of September 26, 1923. * * *"

Why does the brief not point out that the judge who rendered the opinion of September 26 was not the judge who appointed the receiver?

Paragraph XVI alleges there are other matters connected with said receivership and its vacating.

> (1) "In this action the said Joseph moved to compel Menzi to deliver to him the books of Behn, Meyer, which said Menzi held for the account of John Bordman who had purchased them."
>
> In the motion, this sale to Bordman is attacked as illegal for the reason that Bordman was an employee of the Alien Property Custodian. Why does the answer fail to either admit or deny this allegation concerning Boardman?
>
> (2) "Menzi, Bordman and the Bank of the Philippine Islands further moved for leave to intervene in the action for the purpose of setting aside the alleged receivership."
>
> Why is the date of such intervention not set forth so that the court might see that said intervention takes place after the receiver had commenced a suit for fraud against Menzi and Bordman and the bank.
>
> (3) Paragraph XVI sets up Section 21 with the Philippine code providing for intervention by one who had an interest.

Where does the interest of Menzi or the Bank of the Philippine Islands appear?

If Menzi had sold the assets what was he doing with the books of the concern?

It is to be noted that the answer of Menzi to the rule to show cause alleges the books to be in the possession of Bordman: but in the decision of Diaz sent out in paragraph XVII of this answer, the books are said to be in the possession of Menzi.

Paragraph XVIII of the answer sets up that Joseph moved for reconsideration of the ruling of Diaz which was denied: why does the answer not go on and admit or deny the filing of the bill of exceptions?

Paragraph XIX sets up that Joseph, as receiver, sued the Hamburg American line and was defeated.

Why does the answer not show the court that the attorneys for the Hamburg American were the same attorneys as the attorneys for Menzi and Bordman; that in this case they demurred to the complaint; but that Menzi and Bordman did not attempt to intervene in Behn, Meyer *vs.* Stanley until six months later after they had been attacked for fraud and theft.

Paragraph XX sets up the decision of the Supreme Court of the Philippine Islands in the Hamburg American case.

No details are provided except a telegram from the clerk of the court.

It does not appear that the receivership question was ever properly before the court.

The answer does not explain a receivership company collaterally attacked, as seems to have been done in this decision.

Paragraph XXI alleges as follows:

> "Exhibits A and B hereto attached make it plain that the court which originally attempted to appoint him receiver has since declared said appointment to have been improvidently made as a result of a failure to disclose to it essential matters of fact."

This statement is not the truth. The same court did not remove him which appointed him; the substitute judge removed him when the regular judge had appointed him.

Judge Harvey knew the facts of this case. He said so in his order.

Paragraphs XXIX-XL set up and endeavor to allege matters to prove that this suit is properly brought by Behn, Meyer. The allegations themselves are sufficiently extraordinary. The matters which failed to be alleged are even more significant in their omission.

Paragraph XXIX alleges:

> "It is not true that the British authorities have either dissolved the corporation of Behn, Meyer or taken over the corporation itself as such."

And yet in the same paragraph a letter from the Comptroller of Local Clearing House, Singapore, is set forth as follows:

> "Under emergency local legislation only the business carried on by Messrs. Behn, Meyer & Company, Ltd., in the colony was wound up and not Behn, Meyer & Company, Ltd., as a whole."

If, when the Public Trustee wound up Behn, Meyer & Company, Ltd., of Singapore, he did not in fact take over the corporation, then what did he do?

The British Public Trustee in winding up a concern in which enemy interests appeared sold those enemy interests and the proceeds would be in an enemy trust at London.

It is noteworthy that the answer does not allege that the original stockholders who were enemies at the time the British "wound up." Behn, Meyer & Company still hold their stock. Such allegation is not made because it could not be made.

Note in this connection that Lorenz Mayer, Laspre, and Withoefft were original stockholders of Behn, Meyer; note also they were enemy aliens being German Nationals; how would they be able to preserve any holdings in the company at all if the British Trustee had seized the company?

In the motion of intervention, it is alleged that they were enemy aliens; why is this allegation not either admitted or denied?

Note particularly: The answer alleges in this paragraph that Lorenz Mayer, Laspre and Withoefft owned the entire stock of the corporation before this suit was brought. These men were alien enemies and, therefore, the entire company was enemy owned.

How can this be reconciled with paragraph VIII of the bill, which says:

> "The minority of whose capital stock was not held or possessed by any citizen subject or resident of any enemy nation."

Paragraph XXXI alleges an extraordinary general meeting of shareholders. It does not allege where this meeting was held.

It appears, however, from the articles of incorporation of

Behn, Meyer & Company that the home office and domicile of Behn, Meyer was Singapore, and that it was organized under the laws of Singapore.

This extraordinary meeting was not held at Singapore. It was held at Hamburg, as appears from the attestation of the power of attorney, which was executed the day after it was held, namely, December 14, 1921.

If such a meeting could be legal, why is it not alleged where it was held and facts alleged which would show the holding of it in that place to be legal. On the face of it, such meeting is illegal, for it was an endeavor to do a corporate act outside the domicile of the corporation and outside the jurisdiction in which the corporation lived, which jurisdiction is the only thing that gives force and effect to the acts of the corporation. (See pages 21 & 22 of this brief.)

In paragraph XXXV, the giving of the power of attorney to Martens is set up and alleged to be the legal act of the corporation. This power of attorney is appended as an exhibit to the answer. It does not bear the seal of Behn, Meyer & Company. Why?

In paragraph XLI it is alleged that one of the attorneys, Henry D. Green, had in 1919, been an attorney in the Alien Property Custodian's office and was familiar with the liquidation of the Philippine branches of Behn, Meyer.

Why did they not go on and allege that Mr. Green in his official capacity refused to recommend the approval by the Alien Property Custodian of the very sales of Behn, Meyer & Company's property which are in controversy in this proceeding, and that the same never were approved.

The above allegation in reference to Mr. Green is an at-

tempt to bring home knowledge of this proceeding to the receiver so as to make him guilty of laches.

Why does not the answer set forth that Mr. Green remained in the employ of the Custodian until some time in 1921, and that he could not thereafter act in an official capacity as attorney for this company for two years.

Paragraphs XLII, XLIII set up a claim for $10,000.00 made by attorneys of the receiver.

Why does the answer not also set up the fact that this claim was withdrawn?

Paragraph XLVII alleges that during the remainder of this present year the receiver took no step to challenge the right of the plaintiff.

During this present year certified copies of necessary papers had to be collected in Manila, drawn up, executed and sent to this country. As soon as they were received this intervention was filed.

In short, it appears that the attorneys for the plaintiff realized that they could have no standing before this court if, in fact, Joseph was the receiver of Behn, Meyer & Company.

That receivership must be denied at all costs.

But if the seizure and liquidation of Behn, Meyer & Company was illegal and void, then there would be adequate occasion for an appointment of a receiver in the Philippine Islands to recover the properties wrongfully and illegally disposed of and diverted from this company.

The attorneys for the plaintiff, therefore, are compelled to set up the regularity and propriety of the proceedings whereby the company was deprived of its property. In so doing they contradict the allegations of their original bill.

Conclusion.

Wherefore, it is submitted, as stated in appellee's brief in conclusion, on page 21, "The appellant is not one of those who is entitled to the return of the property thus seized;" and it is further submitted that Lazarus G. Joseph, the receiver, is such a party and the only party entitled to the return of the property thus seized.

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